NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RAHMIK BECKETT	:	
Appellant	:	No. 242 EDA 2018

Appeal from the PCRA Order December 8, 2017
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0003564-2012

BEFORE: PANELLA, J., NICHOLS, J., and MUSMANNO, J.

MEMORANDUM BY NICHOLS, J.: **FILED DECEMBER 18, 2018**

Appellant Rahmik Beckett appeals *pro se* from the order dismissing his first timely Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, petition without a hearing. Appellant claims that trial and PCRA counsel were ineffective for failing to challenge the discretionary aspects and the legality of the sentence. He further contends that the PCRA court failed to provide adequate notice of the reasons for dismissing his petition and to conduct an independent review of PCRA counsel's ***Turner***/***Finley***[1] letter. We affirm.

This Court previously summarized the facts and procedural history of Appellant's conviction as follows:

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

> On September 28, 2011, Appellant shot Kevin Jones ("Victim") eight times, killing him. As he fled, Appellant also fired multiple gunshots at pursuing police. As a result, on February 27, 2014, a jury convicted Appellant of [voluntary manslaughter,[2] assault of a law enforcement officer,[3] firearms not to be carried without a license,[4] and possession of an instrument of crime[5]]. On May 16, 2014, the trial court sentenced Appellant to an aggregate term of 20 to 40 years of incarceration. Appellant filed a post-sentence motion, which the trial court denied on May 27, 2014. Appellant filed a notice of appeal on June 20, 2014.

Commonwealth v. Beckett, 1865 EDA 2014 at 1-2 (Pa. Super. filed Nov. 23, 2015). This Court affirmed the judgment of sentence on November 23, 2015.[6] ***See id.*** Appellant did not petition the Pennsylvania Supreme Court for allowance of appeal.

On March 31, 2016, Appellant's filed the *pro se* PCRA petition, which gives rise to the instant appeal. The court appointed PCRA counsel on March 8, 2017,[7] who subsequently filed a ***Turner***/***Finley*** letter on July 10, 2017. On July 27, 2017, the court received Appellant's *pro se* motion for new counsel.

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[2] 18 Pa.C.S. § 2503.

[3] 18 Pa.C.S. § 2702.1.

[4] 18 Pa.C.S. § 6106.

[5] 18 Pa.C.S. § 907.

[6] Appellant's trial counsel also represented Appellant in the direct appeal.

[7] On March 17, 2017, the PCRA court granted Appellant's request to retain private counsel. The court initially granted Appellant until May 5, 2017, to retain private counsel, but extended the time to June 8, 2017. The court advised Appellant that if he did not secure counsel by June 8, 2017, appointed PCRA counsel would represent him. Appellant did not retain private counsel.

On September 15, 2017, the court denied Appellant's request for new counsel and issued a Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition. Appellant mailed a response to the Rule 907 notice to the court.[8]

On December 8, 2017, the court dismissed Appellant's petition and permitted PCRA counsel to withdraw. Appellant timely filed a *pro se* notice of appeal and complied with the PCRA court's order to submit a Pa.R.A.P. 1925(b) statement. The court issued a responsive opinion.

Appellant presents the following issues in this appeal:

> I. Ineffective Assistance on direct and [PCRA] counsels[] in their failure to make challenge to the Sentencing Courts' unreasonable and excessive imposing of sentence on the voluntary manslaughter charge,
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> II. Ineffective Assistance on direct and [PCRA] counsel's in their failure to issue and preserve issue of "Sentencing Merger" to charges of voluntary manslaughter and assaulting a law enforcement officer,
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> III. The PCRA court erred in failing to provide appellant notice of perceived deficiencies of his substantive claims, and not considering the petition and other matters of record before it[s] summary dismissal, and,
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> IV. The PCRA court erred in failing to state on record it[s] independent review of the petition for [PCRA] relief prior to granting counsel's "***Finley*** Letter[.]"

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[8] We note that Appellant's response to the Rule 907 notice was not filed and docketed, and is not contained in the record. The PCRA court, in relevant part, stated that Appellant asserted that "PCRA counsel was ineffective for failure to raise the issue that direct appeal counsel was ineffective for failure to argue that [Appellant]'s sentence for voluntary manslaughter was unreasonable." PCRA Ct. Op., 4/11/18, at 2. Although Appellant raised other claims in his response, ***see id.***, they are not relevant to this appeal.

Appellant's Brief at 4.

Our standard of review from the denial of a PCRA petition "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." ***Commonwealth v. Ousley***, 21 A.3d 1238, 1242 (Pa. Super. 2011) (citation omitted). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo* standard of review to the PCRA court's legal conclusions." ***Commonwealth v. Mitchell***, 105 A.3d 1257, 1265 (Pa. 2014) (internal quotation marks and citation omitted). "Finally, we may affirm a PCRA court's decision on any grounds if the record supports it." ***Commonwealth v. Benner***, 147 A.3d 915, 919 (Pa. Super. 2016) (citation omitted).

Appellant first claims that trial counsel was ineffective for failing to challenge the trial court's sentence of ten to twenty years' imprisonment for voluntary manslaughter in his direct appeal. Appellant contends that the trial court "did not articulate its reasons for deviating from the guidelines." Appellant's Brief at 12. Appellant also contends that PCRA counsel was ineffective for failing to develop this claim. ***Id.*** at 14.

It is well-settled that to establish a claim of ineffective assistance of counsel, a defendant "must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth***

v. Turetsky, 925 A.2d 876, 880 (Pa. Super. 2007) (citation omitted). The burden is on the defendant to prove all three of the following prongs: "(1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." ***Id.*** (citation omitted); ***see also Commonwealth v. Daniels***, 963 A.2d 409, 419 (Pa. 2009) ("A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness." (citation omitted)). To establish arguable merit to a layered claim of PCRA counsel's ineffectiveness, a petitioner must establish all three prongs of prior counsel's ineffectiveness. ***See Commonwealth v. Hall***, 872 A.2d 1177, 1184 (Pa. 2005).

> With respect to Appellant's underlying sentencing claim, we note:
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> > Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Raven, 97 A.3d 1244, 1253 (Pa. Super. 2014) (citation omitted).

The Sentencing Code, in relevant part, provides: "In every case in which the court imposes a sentence for a felony . . . the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement

of the reason or reasons for the sentence imposed." 42 Pa.C.S. § 9721(b). This Court has stated:

> "In every case where the court imposes a sentence . . . outside the guidelines adopted by the Pennsylvania Commission on Sentencing . . . the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines." 42 Pa.C.S. § 9721(b). However, "[t]his requirement is satisfied 'when the judge states his reasons for the sentence on the record and in the defendant's presence.'" Consequently, all that a trial court must do to comply with the above procedural requirements is to state adequate reasons for the imposition of sentence on the record in open court.

Commonwealth v. Antidormi, 84 A.3d 736, 760 (Pa. Super. 2014) (citations omitted).

Instantly, Appellant's trial counsel filed a post-sentence motion challenging the sentence for voluntary manslaughter and raised that issue in the Rule 1925(b) statement prepared in anticipation of Appellant's direct appeal. The trial court responded to that issue in its Rule 1925(a) opinion noting that it sentenced Appellant outside the sentencing guideline range. ***See*** Trial Ct. Op., 12/10/14, at 13. The trial court opined that it

> [t]horoughly reviewed the pre-sentence report, testimony from the victims, and provided [Appellant] with an opportunity to speak at his sentencing hearing. N.T. 5/16/14 at pp. 35-67. Prior to imposing the sentence, the [c]ourt discussed the circumstances surrounding the homicide. [Appellant] shot [Victim] in a very busy neighborhood on a September evening just as school was back in session. ***Id.*** at 69:17-25. People were "outside, walking with their children, walking their dogs, hanging out," yet [Appellant] "unloaded a gun in that area." ***Id.*** at 69:22-25.

Id. Trial counsel did not pursue a challenge to the discretionary aspect of the sentence in the appeal to this Court. ***See Beckett***, 1865 EDA 2014 at 2-3 (listing question presented in the direct appeal).[9]

Our review reveals that Appellant failed to establish any of the necessary prongs of trial counsel's ineffectiveness regarding Appellant's underlying sentencing challenge. There is no indication that the trial court failed to state the reasons for its sentence, that trial counsel's decision to forgo the sentencing claim in the direct appeal was unreasonable, or that the outcome of Appellant's direct appeal would have been different had counsel raised this

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[9] Instead, Appellant raised the following questions in his direct appeal:

> I. Did the lower court err by admitting evidence of Appellant's arrest for gun possession, which did not result in a conviction, when the fact of his arrest was not relevant and did not contradict any of his testimony?
>
> II. Where the homicide file of Kyleem Spain clearly referenced [Victim] from the instant case as a possible suspect, was it error to deny Appellant the opportunity to confront Detective Nathan Williams on cross-examination after Detective Williams denied any reference to [Victim] in the file?
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> III. Did the lower court erroneously exclude portions of [Victim's] Facebook account that were relevant to establish Appellant's legitimate fear of [Victim]?
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> IV. Did the lower court err by prohibiting the jury from bringing a copy of Appellant's confession in its deliberations room pursuant to Pa.R.Crim.P. 646 where Appellant waived the protections under that rule and the Commonwealth agreed?

Beckett, 1865 EDA 2014 at 2-3.

claim. ***See Turetsky***, 925 A.2d at 880. Moreover, because Appellant failed to establish trial counsel's ineffectiveness, PCRA counsel was not ineffective for failing to develop Appellant's challenge.[10] ***See Hall***, 872 A.2d at 1184 (Pa. 2005). Accordingly, there is no basis to disturb the PCRA court's ruling on this claim. ***See Benner***, 147 A.3d at 919.

Next, Appellant argues that the sentence imposed for voluntary manslaughter and assault of a police officer should have merged. Appellant suggests that he engaged in a single criminal episode when shooting and killing Victim and then shooting at police officers, and that elements of the offenses are substantially similar. Appellant's Brief at 15, 20.

> The principles governing our review are well-settled:
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> > A claim that convictions merge for sentencing is a question of law; therefore, our standard of review is *de novo* and our scope of review is plenary.
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> > * * *
> >
> > Merger in Pennsylvania is governed by section 9765 of the Sentencing Code, which provides as follows:
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> > > No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the

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[10] We note that PCRA counsel, in his ***Turner***/***Finley*** letter, addressed Appellant's initial claim that his sentence was excessive and concluded that the claim lacked merit. However, "[c]hallenges to the discretionary aspects of sentencing are not cognizable under the PCRA." ***Commonwealth v. Fowler***, 930 A.2d 586, 593 (Pa. Super. 2007). Nevertheless, the discussion of the underlying merits of the sentencing claim remain relevant when determining whether trial counsel could be held ineffective for failing to challenge the sentence in a direct appeal. ***See Commonwealth v. Collins***, 888 A.2d 564, 573 (Pa. 2005).

> statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.
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> 42 Pa.C.S. § 9765 (emphasis added). "Accordingly, merger is appropriate only when two distinct criteria are satisfied: (1) the crimes arise from a single criminal act; and (2) all of the statutory elements of one of the offenses are included within the statutory elements of the other."

Commonwealth v. Kimmel, 125 A.3d 1272, 1276 (Pa. Super. 2015) (*en banc*) (citations omitted).

Instantly, Appellant shot and killed Victim, and he was convicted of voluntary manslaughter for that act. Appellant then fled, and when pursued by police officers, Appellant fired shots at the officers, and he was convicted of assault of a police officer for that act. Therefore, it is apparent that Appellant's crimes did not arise from a single criminal act. ***See id.*** Accordingly, Appellant's legality of sentence argument merits no relief.

Appellant, in his final two claims, asserts that the PCRA court's Rule 907 notice was deficient for relying on PCRA counsel's ***Turner***/***Finley*** letter. Appellant also claims that the PCRA court failed to conduct an independent review before granting PCRA counsel's request to withdraw.

It is well settled that

> [t]he purpose of a Rule 907 pre-dismissal notice is "to allow a petitioner an opportunity to seek leave to amend his petition and correct any material defects, the ultimate goal being to permit merits review by the PCRA court of potentially arguable claims." The response to the Rule 907 notice "is an opportunity for a petitioner and/or his counsel to object to the dismissal and alert the PCRA court of a perceived error, permitting the court to discern the potential for amendment." The response is also the

> opportunity for the petitioner to object to counsel's effectiveness at the PCRA level. When a PCRA court properly issues Rule 907 notice in compliance with the rules of criminal procedure, an appellant is deemed to have sufficient notice of dismissal.

Commonwealth v. Smith, 121 A.3d 1049, 1054 (Pa. Super. 2015) (citations omitted).

This Court has stated:

> The ***Turner***/***Finley*** decisions provide the manner for post-conviction counsel to withdraw from representation. The holdings of those cases mandate an independent review of the record by competent counsel before a PCRA court or appellate court can authorize an attorney's withdrawal. The necessary independent review requires counsel to file a "no-merit" letter detailing the nature and extent of his review and list each issue the petitioner wishes to have examined, explaining why those issues are meritless. The PCRA court, or an appellate court if the no-merit letter is filed before it . . . then must conduct its own independent evaluation of the record and agree with counsel that the petition is without merit.

Commonwealth v. Rykard, 55 A.3d 1177, 1184 (Pa. Super. 2012) (citation omitted).

In ***Commonwealth v. Glover***, 738 A.2d 460, 466 (Pa. Super. 1999), this Court instructed that a PCRA court should not dismiss a petition by adopting PCRA counsel's ***Turner***/***Finley*** letter. We reasoned:

> When . . . the PCRA Judge affirms by adopting counsel's "no merit" letter, the certified record fails to demonstrate that the PCRA Court has conducted a meaningful independent review of the issues as required under ***Turner*** . . . .
>
> The Pennsylvania Supreme Court recently condemned the wholesale adoption [of] a party's brief in lieu of filing a PCRA opinion on the grounds that the independent role of the judiciary is not properly served absent some autonomous judicial expression of the reasons for dismissing the PCRA petition.

> [***Commonwealth v. Williams***, 732 A.2d 1167, 1176 (Pa. 1999)]. Writing separately, Justice Castille commented adversely on the PCRA Court's failure to file a complete opinion explaining the rationale behind its decision:
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> > The PCRA court's failure to draft an opinion addressing the claims [of the petitioner] constitutes an abdication of the trial court's duty which cannot be condoned. While the PCRA court undoubtedly intended only to conserve its judicial energies, this manner of conservation is inappropriate . . . .
> >
> > The obvious purpose of Pa.R.A.P. 1925(a) is to facilitate appellate review of a particular trial court order. Additionally, however, the rule fulfills an important policy consideration by providing to disputing parties, as well as to the public at large, the legal basis for a judicial decision. The trial court's adoption of one party's advocacy brief, in lieu of an independent judicial opinion, deprives the parties and the public of the independent reasoning of the court. This is especially true for the public because the briefs themselves are normally not as accessible as a judicial opinion may be.
>
> ***Id.*** (Concurring Opinion by Castille, J.), concurring opinion at 1192. We find ourselves in complete agreement with the position taken by Justice Castille.

Glover, 738 A.2d at 466.

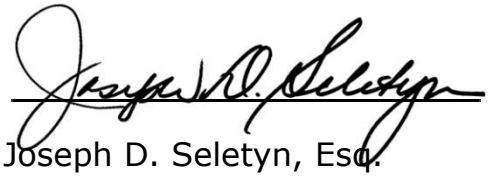
In ***Rykard***, this Court addressed a similar challenge to the one raised by Appellant. In ***Rykard***, the petitioner asserted that the PCRA court improperly adopted counsel's ***Turner***/***Finley*** letter. This Court rejected the argument noting that "[t]he PCRA court herein certified in both its Rule 907 notice and its final order that it reviewed the record and agreed with counsel's no-merit letter" and issued a substantive Rule 1925(a) opinion. ***Rykard***, 55 A.3d at 1186.

Instantly, the PCRA court issued a Rule 907 notice indicating that it agreed with PCRA counsel's assessment that the claims raised in Appellant's

pro se PCRA petition were meritless. Appellant was able to meaningfully respond to the court's notice. As in ***Rykard***, the PCRA court's Rule 907 notice suggested the court's independent review of the record, and the court issued a Rule 1925(a) opinion addressing the merits of the claim. Therefore, Appellant's claims that the PCRA court's Rule 907 notice was substantively defective and that the PCRA court improperly adopted PCRA counsel's ***Turner***/***Finley*** letter warrant no relief. ***See id.***

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/18