

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
ZACKARY PRITCHETT	:	
	:	
Appellant	:	No. 4035 EDA 2017

Appeal from the PCRA Order November 14, 2017  
In the Court of Common Pleas of Philadelphia County Criminal Division at  
No(s): CP-51-CR-0003990-2015

BEFORE: GANTMAN, P.J., LAZARUS, J., and OTT, J.

MEMORANDUM BY LAZARUS, J.:

**FILED OCTOBER 10, 2018**

Zackary Pritchett appeals, *pro se*, from the order of the Court of Common Pleas of Philadelphia County denying his petition for relief under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We vacate and remand.

On July 12, 2016, Pritchett entered a negotiated guilty plea to third-degree murder and the trial court sentenced him to 20 to 40 years' imprisonment. No appeal was filed.

Pritchett filed a timely *pro se* PCRA petition on January 17, 2017, seeking reinstatement of his appellate rights *nunc pro tunc*. The court appointed counsel, who filed a **Turner/Finley** "no merit" letter.<sup>1</sup> The PCRA

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<sup>1</sup> **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (en banc).

court filed notice of intent to dismiss pursuant to Pennsylvania Rule of Criminal Procedure 907, and on November 9, 2017, the PCRA dismissed the petition without a hearing. On November 14, 2017, the court granted counsel's motion to withdraw. On November 30, 2017, Pritchett filed this timely appeal.

Pritchett alleged in his petition that he asked his attorney to appeal and his attorney failed to do so. He alleges that after sentencing, he requested counsel to file an appeal, that he called counsel the next day to inquire about the appeal, and that there was no answer but he left a message and never heard back.<sup>2</sup> Thereafter, Pritchett checked with the clerk of courts and received a docket statement dated December 22, 2016, which showed that no notice of appeal had been filed. *Pro Se PCRA Petition, 11/22/17, at 1.*

PCRA counsel's **Finley** letter states that Pritchett is not entitled to relief on direct appeal because he "knowingly, intelligently, and voluntarily" entered a guilty plea and therefore he can "raise no appellate issue that will disturb that plea." **Finley** Letter, 9/27/17, at 3-4. However, failure to file a direct appeal when requested constitutes ineffectiveness *per se* without regard to the merit of the issues to be raised. **See Commonwealth v. Lantzy**, 736 A.2d 564, 571-72 (Pa. 1999). Before a court will find ineffectiveness of trial counsel for failing to file a direct appeal, however, a petitioner must prove that

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<sup>2</sup> He also alleged that he did not attend school after kindergarten, his mother kept him locked in his room and physically and sexually abused him, his IQ is 67 and he suffers from mental health issues.

he requested an appeal and that counsel disregarded this request. ***Commonwealth v. Touw***, 781 A.2d 1250, 1254 (Pa. Super. 2001). In such a circumstance, a defendant is automatically entitled to reinstatement of his appellate rights. ***Lantzy, supra*** at 572. Counsel has a constitutional duty to consult with a defendant about an appeal where counsel has reason to believe either (1) that a rational defendant would want to appeal, for example, because there are meritorious grounds for appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. ***Touw, supra*** at 1254 (citing ***Roe v. Flores-Ortega***, 528 U.S. 470, 480 (2000)).

The PCRA court states in its opinion that Pritchett “provides no evidence that he requested or attempted to request counsel to file a notice of appeal[.]” PCRA Court Opinion, 4/18/18, at 4. However, Pritchett was not given the opportunity of an evidentiary hearing with appointed PCRA counsel to prove that he asked plea counsel to file an appeal. Thus we do not have the benefit of any findings of fact or credibility determinations regarding Pritchett’s ineffectiveness claim.

We vacate the PCRA court’s order and remand for appointment of new counsel and the filing of a counseled PCRA petition so that Pritchett may have the opportunity to prove his allegation that he requested an appeal.<sup>3</sup>

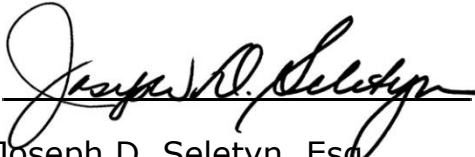
Vacated and remanded. Jurisdiction relinquished.

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<sup>3</sup> We note that Commonwealth does not oppose relief.

J-S59025-18

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 10/10/18