

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
ERIC COOPER	:	
	:	
Appellant	:	No. 490 WDA 2018

Appeal from the Judgment of Sentence November 7, 2017
 In the Court of Common Pleas of Allegheny County Criminal Division at
 No(s): CP-02-CR-0014325-2016

BEFORE: OTT, J., MURRAY, J., and STEVENS*, P.J.E.

MEMORANDUM BY MURRAY, J.: **FILED OCTOBER 10, 2018**

Eric Cooper (Appellant) appeals from the judgment of sentence imposed after he pled guilty to involuntary deviate sexual intercourse (IDSI) with a child and related offenses. We affirm.

The trial court summarized the procedural history of this case as follows:

[Appellant] was charged with Rape of a Child, [IDSI] with a Child, Unlawful Contact with a Minor, Incest, Endangering the Welfare of a Child, Corruption of Minors, Indecent Assault of a Person Under 13, and Indecent Exposure in relation to a series of incidents with [the] six (6) year old [victim]. He appeared before this Court on November 7, 2017 and, pursuant to a plea agreement with the Commonwealth, pled guilty to all charges except Rape of a Child, which was withdrawn. Also pursuant to the terms of the agreement, he was immediately sentenced to consecutive terms of imprisonment of 10 to 20 years at the IDSI charge and three (3) to six (6) years at the Unlawful Contact charge, for an aggregate term of imprisonment of 13 to 26 years.

* Former Justice specially assigned to the Superior Court.

Trial Court Opinion, 7/9/18, at 1-2 (footnotes to relevant sections of the Crimes Code omitted). Appellant was represented by Assistant Public Defender Joseph Paletta, Esquire (Plea Counsel).

Appellant subsequently filed a *pro se* motion to withdraw guilty plea which alleged Plea Counsel's ineffective representation. The motion bears two time stamps: one stating "Received" on "[illegible month] 29, 2017" by the trial judge, and one stating "Filed" on December 1, 2017 by the clerk of courts. The certified electronic record does not include a trial docket, but an "index" states that the motion has a "filing date" of December 1, 2017. Thereafter, the trial court issued an order, dated December 18, 2017 and time-stamped with the Clerk of Courts on January 3, 2018, which states:

AND NOW, this 18th day of December, 2017, the Court sentenced [Appellant] on November 7, 2017. A few days later, chambers received a *pro se* filing Motion to Withdraw Guilty Plea which will be considered timely as the envelope bears a postmark of November 15, 2017. The Court feels a hearing is necessary.

Order, 1/3/18. Consistent with this order, the trial court's opinion states, "On November 15, 2017, [Appellant] filed a *pro se* Motion to Withdraw his guilty plea." Trial Court Opinion, 7/9/18, at 2.

The trial court convened a hearing on January 16, 2018. The court did not hear argument on Appellant's claims. Instead, because Appellant alleged ineffective assistance of Plea Counsel, the court allowed Plea Counsel to withdraw from representation, and appointed Brandon Herring, Esquire, to represent Appellant.

Attorney Herring filed a post-sentence motion on Appellant's behalf on February 7, 2018, which he characterized as an amendment to Appellant's *pro se* motion. The amended motion averred that Appellant's guilty plea was not knowingly, intelligently, and voluntarily made and that Plea Counsel was ineffective for failing to properly prepare for trial.

On March 12, 2018, the court conducted a hearing at which Plea Counsel and Appellant testified with respect to the ineffective assistance of counsel claims. Pertinently, Appellant did not make any express waiver of his right to collateral review. The trial court denied Appellant's motion and the corresponding order was entered on March 13, 2018.¹

Subsequently, the trial court allowed Attorney Herring to withdraw from representation, and appointed current counsel, Veronica Brestensky, Esquire, to represent Appellant. On April 6, 2018, Appellant filed a timely notice of appeal along with a Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The trial court issued an opinion on July 9, 2018 which addressed the merits of Appellant's ineffective assistance claims and concluded that no relief was due.

¹ It appears that the trial court may have considered that Appellant's ineffectiveness claims were not appropriate issues for a post-sentence motion. **See** N.T. Hearing, 3/12/18, at 22-23 ("The fact that there are some very non-specific reasons for [Appellant] alleging ineffectiveness of [Plea Counsel] I find not to be a basis for post-sentencing motions."). Nevertheless, as we state **infra**, the court's opinion addressed, and denied relief, based upon the merits of Appellant's ineffectiveness claims. Trial Court Opinion, 7/9/18, at 2-17.

On appeal, Appellant presents two issues for our review:

1. Whether [Appellant's] *pro se* Motion to Withdraw Guilty Plea was timely — as he was incarcerated and the postmark on the envelope from the Allegheny County Jail containing said Motion was dated within the 10-day after sentencing — and effective to toll, under Pa.R.Cr.P. 720, the appeal period and displaced the general common law rule that *pro se* post-sentence motions are nullities when filed when the defendant is represented by counsel where the Allegheny County Department of Court Records (Criminal Division) failed to forward said Motion to counsel of record as required by Pa.R.[Crim.]P. 576(A)(4), plea and sentencing counsel believed he could not and was reluctant to represent [Appellant] further in this matter because one or more claims of ineffective assistance of counsel were asserted in said Motion, new counsel was appointed more than 30 days after sentencing, and the Court of Common Pleas found (by Order dated December 18, 2017) said Motion to be timely filed?

2. Whether trial counsel was ineffective for causing [Appellant] to enter an unknowing, unintelligent and involuntary plea where [Appellant] was not permitted to fully review discovery, was not informed the victim's mother did not want to pursue charges, counsel answered the questions in the written plea colloquy, and [Appellant] was forced, threatened or coerced by counsel to pled guilty after being told it was too late to proceed to trial and not to disrupt the courtroom by indicating he wished to proceed to trial?

Appellant's Brief at 4.

First, Appellant acknowledges that the trial court deemed his *pro se* post-sentence motion to withdraw guilty plea to be timely, and avers that this Court should likewise find that both the motion and this appeal are timely. Appellant acknowledges that a *pro se* post-sentence motion, when filed by a represented defendant, has been held to be a legal nullity with no legal effect. ***Id.*** at 12, ***citing Commonwealth v. Ruiz***, 131 A.3d 54, 56 n.4 (Pa. Super. 2007); ***Commonwealth v. Nischan***, 928 A.2d 349, 355 (Pa. Super. 2007).

However, Appellant avers that although the trial court received Appellant's *pro se* motion "a few days" after sentencing on November 7, 2017, it did not formally acknowledge the motion until December 18, 2017. Appellant asserts that this delay violated Pa.R.Crim.P. 576(A)(4), which requires the clerk of courts to forward, within 10 days, a *pro se* filing by a represented defendant to his attorney. Appellant further alleges that the delay was due to a breakdown in the court system, because Plea Counsel "was not made aware of the filing until well after expiration of the appeal period." Appellant's Brief at 9, 14. Likewise, the Commonwealth agrees that Appellant's *pro se* motion and this appeal should be deemed timely. Commonwealth's Brief at 10-12.

Although the trial court found Appellant's *pro se* motion to be timely, the timeliness of an appeal goes to our jurisdiction, and we may consider it *sua sponte*. The standard of review is *de novo*, and the scope of review is plenary. **See Commonwealth v. Williams**, 106 A.3d 583, 586 (Pa. 2014).

As Appellant points out, Pa.R.Crim.P. 576(A)(4) provides:

In any case in which a defendant is represented by an attorney, if the defendant submits for filing a written motion . . . that has not been signed by the defendant's attorney, the clerk of courts shall accept it for filing, time stamp it with the date of receipt and make a docket entry reflecting the date of receipt, and place the document in the criminal case file. A copy of the time stamped document shall be forwarded to the defendant's attorney and the attorney for the Commonwealth within 10 days of receipt.

See Pa.R.Crim.P. 576(A)(4). "[A] written post-sentence motion shall be filed no later than 10 days after imposition of sentence." Pa.R.Crim.P. 720(A)(1).

"If the defendant files a timely post-sentence motion, the notice of appeal

shall be filed . . . within 30 days of the entry of the order deciding the motion[.]” Pa.R.Crim.P. 720(A)(2)(a). “If the defendant does not file a timely post-sentence motion, the defendant’s notice of appeal shall be filed within 30 days of imposition of sentence[.]” Pa.R.Crim.P. 720(A)(3). When a defendant is represented by counsel, a *pro se* post-sentence motion is generally deemed a legal nullity. **Ruiz**, 131 A.3d at 56 n.4. “Generally, an appellate court cannot extend the time for filing an appeal. Nonetheless, this general rule does not affect the power of the courts to grant relief in the case of fraud or breakdown in the processes of the court.” **Commonwealth v. Patterson**, 940 A.2d 493, 498 (Pa. Super. 2007).

Here, Appellant was sentenced on November 7, 2017, and the 10-day period for filing a post-sentence motion would have expired on November 17, 2017. **See** Pa.R.Crim.P. 720. The trial court acknowledged that it received Appellant’s *pro se* motion to withdraw guilty plea “[a] few days” after the November 7, 2017 sentencing hearing. Order, 1/3/18. Pursuant to Rule 576(A)(4), the motion should have been time-stamped and docketed with the date of receipt; also, a copy of the motion should have been forwarded to Plea Counsel within 10 days of receipt.² **See** Pa.R.Crim.P. 576(A)(4). However,

² We thus note it was error for the trial court to apply the prisoner mailbox rule and find that the *pro se* motion was timely filed on that basis. **See Commonwealth v. Jordan**, 182 A.3d 1046, 1048 n.3 (Pa. Super. 2018) (“prisoner mailbox rule provides that *pro se* prisoner’s document is deemed filed on date he delivers it to prison authorities for mailing”).

the motion was not stamped as “received” by the trial judge until approximately November 29, 2017,³ and in any event, not stamped as “filed” in the clerk of courts until December 1, 2017. Both of these dates fell outside the 10-day period for Appellant to file a post-sentence motion. Furthermore, the record does not indicate when the *pro se* motion was forwarded to Plea Counsel. We agree with Appellant that this delay was a breakdown in the court process. **See Patterson**, 940 A.2d at 498. We also note that that the trial court accepted Appellant’s February 7, 2018 counseled post-sentence motion as a timely-filed amended post-sentence motion and the Commonwealth did not object. Accordingly, Appellant’s post-sentence motion, as well as his notice of appeal, which was filed within 30 days of the March 13, 2018 denial of the post-sentence motion, were timely. **See** Pa.R.Crim.P. 720(A)(2)(a).

Appellant’s second issue concerns his claims of ineffective assistance of Plea Counsel. Although Appellant presents argument challenging the trial court’s denial of relief on the merits, he also avers, “As an initial matter, the ineffectiveness claim presented is **not** adequately developed pursuant to the **Bomar** exception to the **Grant** deferral rule. Consequently, this claim must be dismissed without prejudice.” Appellant’s Brief at 16 (emphasis in

³ As stated above, the month in the trial judge’s “received” stamp is illegible.

original).⁴ The Commonwealth agrees that Appellant's ineffectiveness claims should be dismissed without prejudice to raise them under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9545.

Our Supreme Court has explained:

[W]e hold that **Grant's** general rule of deferral to PCRA review remains the pertinent law on the appropriate timing for review of claims of ineffective assistance of counsel[.] We recognize two exceptions, however, both falling within the discretion of the trial judge. First, we appreciate that there may be extraordinary circumstances where a discrete claim . . . of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice; and we hold that trial courts retain their discretion to entertain such claims. . . .

Second, with respect to other cases and claims, . . . where the defendant seeks to litigate multiple or prolix claims of counsel ineffectiveness, including non-record-based claims, **on post-verdict motions and direct appeal, we repose discretion in the trial courts to entertain such claims, but only if** (1) there is good cause shown, and (2) **the unitary review so indulged is preceded by the defendant's knowing and express waiver of his entitlement to seek PCRA review from his conviction and sentence**, including an express recognition that the waiver subjects further collateral review to the time and serial petition restrictions of the PCRA.

⁴ See **Commonwealth v. Bomar**, 826 A.2d 831 (Pa. 2003); **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002). See also **Commonwealth v. Liston**, 977 A.2d 1089, 1091 (Pa. 2009) ("In **Grant**, this Court held that claims alleging ineffective assistance of counsel should be deferred until the collateral stage of proceedings. . . . In **Bomar**, this Court carved out an exception to the **Grant** rule and held that an appellate court may consider ineffective assistance claims on direct appeal only if the claims were raised below, developed in the certified record, and definitively determined by the lower court.").

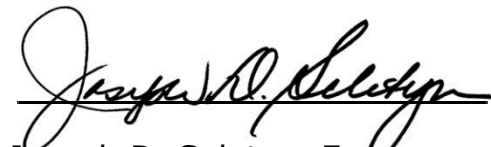
Commonwealth v. Holmes, 79 A.3d 562, 563-564 (Pa. 2013) (emphasis added, footnotes omitted).

Appellant does not claim that his ineffectiveness claims fall within the first category of claims contemplated by ***Holmes*** to be allowed, as an exception to the ***Grant*** rule, on direct appeal. ***See id.*** With respect to the second category, Appellant does not qualify for relief, as he did not make an express waiver of his right to PCRA relief. A careful review of both Appellant's *pro se* and counseled post-sentence motions, as well as the notes of testimony from the March 12, 2018 hearing, confirm Appellant's assertion that he did not waive his right to collateral review. Accordingly, we do not consider the merits of Appellant's ineffectiveness claim.

As Appellant does not present any further request for relief, we affirm the judgment of sentence. However, we do so without prejudice to Appellant to raise claims under the PCRA.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/2018