

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
MATTHEW PAVERETTE	:	
	:	
Appellant	:	No. 1121 EDA 2018

Appeal from the PCRA Order March 14, 2018
 In the Court of Common Pleas of Philadelphia County
 Criminal Division at No(s): CP-51-0011246-2010

BEFORE: PANELLA, P.J., KUNSELMAN, J., and MUSMANNO, J.

MEMORANDUM BY PANELLA, P.J.: **FILED OCTOBER 1, 2019**

Matthew¹ Paverette appeals *pro se* from the order dismissing his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA")² without a hearing. As we find no indication in the record that counsel of record was formally permitted to withdraw from representation, we remand for further proceedings consistent with this memorandum.

The PCRA court summarized the history underlying the instant appeal as follows:

On June 28, 2013, a jury convicted [Paverette] of aggravated assault, conspiracy to commit aggravated assault, carrying firearms in public in Philadelphia, and possession of an instrument of crime. The trial court sentenced [Paverette] to a term of imprisonment of 10 to 20 years. [Paverette] filed a direct appeal

¹ Paverette's first name is variously spelled "Mathew" or "Matthew" on court documents. We adopt the spelling utilized by Paverette on his *pro se* filings.

² 42 Pa.C.S. §§ 9541-9546.

from the aforementioned conviction and judgment of sentence on December 5, 2013. On May 6, 2016, [the] Superior Court affirmed the conviction and Judgment of Sentence. [Paverette] filed a petition for allowance of appeal which was denied by the Supreme Court on September 19, 2016.

PCRA Court Opinion, 9/4/2018, at 1-2 (footnote omitted).

On December 19, 2016, Paverette filed a timely *pro se* PCRA petition. Counsel was appointed to assist Paverette, however he did not seek to amend the *pro se* petition. Rather, counsel filed a **Turner/Finley**³ “no-merit” letter in which he requested permission to withdraw. Counsel asserted that Paverette’s claim for relief was “wholly frivolous” after conducting an independent review.

Following counsel’s letter, the trial judge issued a Rule 907 notice⁴ to Paverette advising him that the court intended to dismiss his PCRA petition

³ **See Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

⁴ A copy of the Rule 907 notice was not included in the certified record and therefore we cannot verify the contents of the notice or the date of its delivery. However, it seems by the PCRA court’s own admission that there was a problem with delivery of the original notice, and a second notice was sent to Paverette on January 29, 2018.

Having reviewed the pleadings and conducted an independent review on December 14, 2017, this Court sent Petitioner notice of its intent to dismiss his PCRA petition without a hearing pursuant to Pa.R.Crim.P. 907 (907 notice). However, on January 2, 2018, the notice was returned to the Court as undeliverable because the inmate name and identification number did not match. A second notice was sent to Petitioner on January 29, 2018.

without hearing. On March 14, 2018, the trial court dismissed the PCRA petition.⁵ The instant *pro se* appeal was filed on April 11, 2018. On May 9, 2018, the PCRA court ordered Paverette to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On May 25, 2018, Paverette filed a *pro se* Rule 1925(b) statement with the PCRA court.

Prior to reaching the merits of the instant appeal, we are compelled to address the issue of whether Paverette is currently represented by counsel. Rule 120(A)(4) of our Rules of Criminal Procedure provides that “[a]n attorney who has been retained or appointed by the court shall continue such representation through direct appeal or until granted leave to withdraw by the court.” Pa.R.Crim.P. 120(A)(4). Well-established Pennsylvania law provides that a defendant is not entitled to file documents *pro se* while represented by counsel. **See Commonwealth v. Ellis**, 626 A.2d 1137, 1141 (Pa. 1993) (defendant does not have the constitutional right to self-representation as well

PCRA Court Opinion, 9/4/2018, at 2. Paverette filed a response to the re-sent 907 notice on February 14, 2018. In his response, Paverette asserted that he had never received a copy of counsel’s **Turner/Finley** letter, and that the letter was not attached to the re-sent 907 notice. Further, counsel’s letter merely provides “cc: Mr. Mathew [sic] Paverette],” with no address or affidavit of service. We therefore cannot conclude that Paverette ever received a copy of the **Turner/Finley** letter, as required by **Commonwealth v. Widgins**, 29 A.3d 816, 818 (Pa. Super. 2011).

⁵ The order of dismissal did not include any reference to counsel’s request to withdraw from representation other than noting the **Turner/Finley** letter had been re-sent. **See** Order Dismissing Post-Conviction Relief Act(PCRA) Petition, dated 3/14/2018.

as counseled representation at the trial or appellate level). Therefore, we generally treat *pro se* filings while an appellant remains represented as legal nullities. **See Commonwealth v. Ali**, 10 A.3d 282, 293 (Pa. 2010) (reiterating that hybrid representation is not permitted).

Instantly, the record reflects that counsel was appointed to represent Paverette during the pendency of his first PCRA proceedings. There is no indication in the record before us that defense counsel was ever formally permitted to withdraw⁶, or that Paverette requested to proceed *pro se*⁷. As Pennsylvania does not permit hybrid representation, it was improper for Paverette to file a *pro se* notice of appeal and a *pro se* Rule 1925(b) statement.

⁶ It is clear counsel attempted to withdraw. Further, the law provides a clear process for withdrawal.

For a variety of reasons, from ethical reasons to financial concerns, counsel properly may seek to withdraw from representing a client. *Regardless of the legitimacy of counsel's grounds for withdrawal as counsel, formal leave of court is nonetheless clearly and unequivocally required before counsel may be deemed to have withdrawn as counsel.*

Commonwealth v. Keys, 580 A.2d 386, 387 (Pa. Super. 1990) (citations omitted) (emphasis in original). However, similar to **Keys**, nothing in the certified record indicates an actual application for withdrawal or an order from the court granting counsel leave to withdraw.

⁷ We note this is not a case where the appellant knowingly and voluntarily waived his right to counsel and elected to proceed *pro se*. **See Commonwealth v. Pursell**, 724 A.2d 293, 301 (Pa. 1999) (“A defendant has the constitutional right to proceed without counsel if the decision to do so is knowing and voluntary”). Rather, Paverette was left without active representation and proceeded *pro se* of necessity.

Further, the trial court erred by serving the order directing compliance with Rule 1925(b) on Paverette while he was still represented by counsel.

Despite the errors noted above, we decline to quash the appeal. Because an appellant has the right of appeal under Article 5, section 9 of the Pennsylvania Constitution, we are required to address *pro se* notices of appeal filed while an appellant is represented by counsel. **See Commonwealth v. Williams**, 151 A.3d 621, 624 (Pa. Super. 2016). However, because Paverette was still seemingly represented by counsel at the time he filed his *pro se* Rule 1925(b) statement, this *pro se* filing would be a legal nullity. **See Ali**, 10 A.3d at 293.

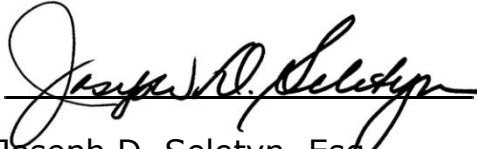
Accordingly, we are constrained to remand this case to the trial court to clarify the record on counsel's status. The PCRA court must review the record and determine if counsel complied with all necessary requirements for withdrawal. If the court determines counsel has complied, the court shall ensure that an order permitting counsel to withdraw is included in the certified record.

If counsel has not complied, the court must, in its discretion, either deny counsel permission to withdraw or appoint substitute counsel to represent Paverette. In either event, counsel will be allowed to file a Rule 1925 statement of matters complained of on appeal.

If Paverette moves to proceed *pro se* despite the availability of counsel, the PCRA court must hold a **Grazier** hearing.

Case remanded. PCRA court to review the record for compliance with all applicable requirements for counsel's withdrawal. Within sixty days of this order, the court must enter all necessary orders to permit this appeal to proceed. Jurisdiction retained.

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: 10/1/19