

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

TODD PHILLIP ALLEN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2173 EDA 2012

Appeal from the PCRA Order June 28, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0002552-2009

BEFORE: STEVENS, P.J., BOWES, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J.

FILED MAY 01, 2013

This is an appeal from the order entered in the Court of Common Pleas of Montgomery County, which, pursuant to Pa.R.Crim.P. 907(1), dismissed without a hearing Appellant's second Post Conviction Relief Act¹ ("PCRA") petition as patently untimely and qualifying for no exceptions to the statutory time-bar. For reasons explained below, we vacate the order below and remand for further proceedings consistent with this decision.

Appellant charges the PCRA court with erroneously failing to construe a recent decision of Supreme Court of the United States, *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), as conferring a new constitutional right to effective

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S.A. §§ 9541-9545.

counsel during the plea process that applied retroactively to his case so as to preclude application of the PCRA time-bar. The PCRA court instead construed **Lafler** as simply recognizing and clarifying the settled principle that a defendant's Sixth Amendment rights extend to guilty pleas and protect against advice that would induce an unknowing, involuntary, and unintelligent plea. **See, e.g., Commonwealth v. Allen**, 833 A.2d 800, 802 (Pa. Super. 2003), **appeal denied**, 580 Pa. 703, 860 A.2d 488 (2004). **Cf. Commonwealth v. Garcia**, 23 A.3d. 1059 (Pa. Super. 2011) (Recognizing no new constitutional right in **Padilla v. Kentucky**, --- U.S. ----, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), in which United States Supreme Court held criminal defense attorney is constitutionally ineffective for failing to fully counsel a criminal defendant as to the immigration consequences of a plea).

We refrain from addressing the merits of the appeal, however, as the record reveals that the PCRA court disposed of Appellant's second petition without jurisdiction to do so. Appellant filed his second PCRA petition during the pendency of his appeal to the Pennsylvania Supreme Court on his first PCRA petition.² Under **Commonwealth v. Lark**, 560 Pa. 487, 746 A.2d 585

² Appellant filed this, his *second* PCRA petition, on May 21, 2012. Still pending at that time was Appellant's Petition for Allowance of Appeal ("PAA") from our memorandum decision in **Commonwealth v. Allen**, No. 2349 EDA 2011, unpublished memorandum (Pa. Super. filed April 23, 2012) in which we affirmed the order dismissing his *first* PCRA petition. While Appellant's PAA regarding his first petition was still pending, the PCRA court below dismissed his second PCRA petition on the merits (by order of July 10, *(Footnote Continued Next Page)*)

(2000), a PCRA trial court may not entertain a new PCRA petition when a prior petition is still under review on appeal.

Cognizant of **Lark**, Appellant explains that he filed his second PCRA petition during the pendency of his first PCRA appeal only to ensure that he met the PCRA's due diligence requirement that a petitioner file a newly-recognized constitutional right claim within 60 days of the date on which he could have first filed it. The problem with Appellant's argument is that **Lark** and its progeny hold that a pending disposition of a prior PCRA petition or appeal tolls the 60-day period, which commences only upon final resolution of the petition. **See Commonwealth v. Steele**, 599 Pa. 341, 380, 961 A.2d 786, 808-809 (2008) (holding **Lark** prohibition against filing subsequent PCRA petition during pendency of first PCRA appeal permits petitioner to raise claim of new right as exception to one-year time-bar within 60 days of the date of the order that finally resolves first PCRA petition).

Nevertheless, Appellant's oversight did not relieve the PCRA court of its obligation to quash the second PCRA petition as prematurely filed, without prejudice against Appellant to refile the second PCRA petition within 60 days of the order finally resolving his first PCRA petition. The PCRA court

(Footnote Continued) _____

2012). Timely notice of appeal from the order denying relief on the second petition was filed with this Court in the case *sub judice* on July 19, 2012, with Appellant's PAA still pending before the Supreme Court. The Pennsylvania Supreme Court ultimately denied Appellant's PAA regarding his first petition on October 24, 2012.

failed to do this, opting instead to enter an order dismissing, on the merits, a second petition over which it had no jurisdiction.³

Accordingly, we are compelled to vacate the order and remand this matter to the PCRA court, where Appellant shall have sixty days from the date of this order to raise, in what will count as his second PCRA petition, a claim of a newly recognized right in **Lafler**.

Order vacated. Case remanded for further proceedings consistent with this decision. Panel jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 5/1/2013

³ In its Opinion pursuant to Pa.R.A.P. 1925, the PCRA court acknowledges that **Lark** controls the present case.