

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TODD ANZALDI,	:	
	:	
Appellant	:	No. 242 WDA 2012

Appeal from the PCRA Order January 24, 2012,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0013233-2008

BEFORE: DONOHUE, MUNDY and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: March 5, 2013

Todd Anzaldi (“Anzaldi”) appeals from the order of the Court of Common Pleas Allegheny County, entered on January 24, 2012, dismissing without a hearing his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we vacate and remand.

In Anzaldi’s direct appeal, a prior panel of this court summarized the factual and procedural histories of this case as follows:

On June 18, 2008, appellant, while driving intoxicated at an excessive rate of speed, struck three parked vehicles. One of the vehicles was a parked police car with an officer inside. As a result of appellant’s conduct, he was charged with multiple crimes: Count 1 - aggravated assault by vehicle of Officer Ryan Kempert while driving under the influence; Count 2 - driving under the influence of alcohol: .16% or higher, 2nd offense; Count 3 - driving under the influence of alcohol, 2nd offense;

*Retired Senior Judge assigned to the Superior Court.

Count 4 - driving under the influence of alcohol, 3rd offense; Count 5 - unauthorized use of automobile; one summary count of driving while operating privilege suspended and/or revoked; and one summary count of reckless driving.^{[FN]1}

On September 3, 2009, appellant appeared with privately retained counsel before the Honorable John K. Reilly, Jr., and entered a guilty plea. The Commonwealth withdrew Counts 3 and 4 after being informed that appellant was entering a guilty plea as those counts would have merged with Count 2 for sentencing. Appellant completed a written guilty plea colloquy, and after an oral colloquy, the trial court accepted his non-negotiated guilty plea to all the remaining charges. Appellant waived the preparation of a pre-sentence report and elected to proceed immediately to sentencing.

The trial court imposed the following sentence. Count 1: 18 months to 60 months' incarceration in a state correctional facility with 12 days credit and restitution of \$12,607.95; Count 2: 12 months to 60 months' incarceration in a state correctional facility to be served consecutive to Count 1 and a \$2,500 fine; Count 5: 2 years' probation to be served consecutive to parole; and driving under suspension - 90 days' incarceration to be served concurrent to Count 1 and a \$1,000 fine. The aggregate sentence was 30 to 120 months' incarceration followed by two years' probation. While on parole, appellant was ordered to undergo counseling and refrain from the possession and use of alcoholic beverages.

Appellant filed a *pro se* PCRA[] petition on February 26, 2010. The Allegheny County Public Defender's Office was appointed to represent him, and on July 13, 2010, an amended PCRA petition was filed. In an answer filed on August 16, 2010, the Commonwealth agreed to the reinstatement of appellant's post-sentence motion and/or direct appeal rights *nunc pro tunc*. On August 17, 2010,

the trial court reinstated appellant's rights to file a post-sentence motion and a direct appeal.

On August 26, 2010, appellant filed a post-sentence motion, and on October 26, 2010, a hearing was held. The trial court determined that Count 2 should have merged with Count 1 and vacated the sentence at Count 2. Appellant was given 430 days' credit, and the trial court orally denied appellant's request to withdraw his guilty plea. Appellant was left with a sentence of 18 months to 5 years, and 2 years of probation.

On October 28, 2010, a motion for reconsideration was filed by the Commonwealth in which it argued that the sentence was too lenient. The trial court heard argument on the motion and, on November 30, 2010, granted the Commonwealth's motion and a new sentence was imposed of 30 months to 10 years' incarceration on Count 1 and consecutive 2 years' probation. [...]

[FN]¹ 75 Pa.C.S.A. § 3735.1(a); 75 Pa.C.S.A. § 3802(c) and 3803(b)(4); 75 Pa.C.S.A. § 3802(a)(1), 3803(b)(3), and 3804(b); 75 Pa.C.S.A. § 3802(a)(1) and 3803(a)(2); 18 Pa.C.S.A. § 3928; 75 Pa.C.S.A. § 1543(a) or (b); 75 Pa.C.S.A. § 3736, respectively.

Commonwealth v. Anzaldi, 242 WDA 2012, *1-3 (unpublished memorandum July 19, 2011) (footnote omitted).

On direct appeal, this Court affirmed Anzaldi's judgment of sentence on July 19, 2011. On October 19, 2011, Anzaldi filed a *pro se* PCRA petition, and the PCRA court appointed PCRA counsel.¹ Instead of filing an amended

¹ The PCRA court appointed Veronica Brestensky, Esq. as Anzaldi's PCRA counsel.

PCRA petition, PCRA counsel filed a *Turner/Finley*² no merit letter and a request to withdraw as counsel on November 21, 2011. On November 30, 2011, the PCRA court entered the following order:

AND NOW, this 30th day of November, 2011. It is the [c]ourt's intention to dismiss the PCRA petition without a hearing under *Pa.R.Crim.P. 720(1)* [sic].^[3] The [c]ourt is persuaded, at least at this time, by the no merit letter received from counsel. *Mr. Smith*^[4] may respond to thi[s] proposed dismissal within 40 days of the date of this notice.

PCRA Court Order, 11/30/2011 (emphasis added) (footnotes added). This notice did not garner any response from Anzaldi. On January 24, 2012, the PCRA court agreed with PCRA counsel's no merit letter and dismissed Anzaldi's PCRA petition without granting PCRA counsel's request to withdraw. PCRA Court Order, 1/24/2012. However, on February 1, 2012, the PCRA court granted PCRA counsel's petition to withdraw, effective March 1, 2012, so PCRA counsel could continue to represent Anzaldi through the appeal period. On February 7, 2012, PCRA counsel filed a timely notice of

² *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 550 A.2d 213 (1988) (*en banc*).

³ Rule 720(A)(1), regarding post-sentence procedures and appeal, states: "(1) Except as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence." Pa.R.Crim.P. 720(A)(1). The PCRA court presumably intended to refer to Pa.R.Crim.P. 907(1).

⁴ The PCRA court's reference to Mr. Smith is in error as Anzaldi was the PCRA petitioner.

appeal and a Pa.R.A.P. 1925(b) statement.⁵ The following day, the PCRA court appointed new PCRA counsel,⁶ and Anzaldi filed a redundant *pro se* notice of appeal. On August 27, 2012, the trial court filed its Pa.R.A.P. 1925(a) opinion.

On appeal, Anzaldi, through counsel, raises the following three issues for our review: (1) Whether the PCRA court erred by dismissing Anzaldi's petition when Anzaldi was confused by the errors in the notice of intent to dismiss and did not understand his obligation to respond the notice. Appellant's Brief at 4. (2) Whether the PCRA court erred by dismissing Anzaldi's petition without a hearing when he would have responded *pro se*

⁵ When PCRA counsel files a request to withdraw and a no-merit letter pursuant to *Turner/Finley*, the PCRA court must conduct its own independent review of the record and if it agrees with PCRA counsel that the petition is meritless, the PCRA court may grant the request to withdraw. *Commonwealth v. Widgins*, 29 A.3d 816, 818 (Pa. Super. 2011) (citation omitted). The procedure followed by the PCRA court in this case, clearly did not comply with established *Turner/Finley* procedure. Although the PCRA court agreed with PCRA counsel's no-merit letter, it did not grant PCRA counsel's request to withdraw until after she filed a notice of appeal on Anzaldi's behalf.

⁶ We point out that when counsel has been permitted to withdraw pursuant to the requirements of *Turner/Finley*, the PCRA court is not to appoint new counsel. *Commonwealth v. Rykard*, 55 A.3d 1177, 1183 n.1 (Pa. Super. 2012); *Commonwealth v. Maple*, 559 A.2d 953, 956 (Pa. Super. 1989). In *Maple*, we stated: "when counsel has been appointed to represent a petitioner in post-conviction proceedings as a matter of right under the rules of criminal procedure and when that right has been fully vindicated by counsel being permitted to withdraw under the procedure authorized in *Turner*, new counsel shall not be appointed and the petitioner, or appellant, must thereafter look to his or her own resources for whatever further proceedings there might be." *Maple*, 559 at 956 (footnote omitted).

with objections to the notice of intent to dismiss. *Id.* (3) Whether the PCRA court erred by failing to grant PCRA counsel's request to withdraw in the notice of intent to dismiss, which confused Anzaldi and led him to believe he was still represented by counsel who would respond to the notice of intent to dismiss on his behalf. *Id.*⁷

"Our standard of review in PCRA appeals is limited to determining whether the findings of the PCRA court are supported by the record and free from legal error." *Commonwealth v. Johnson*, 600 Pa. 329, 345, 966 A.2d 523, 532 (2009) (citation omitted). "Our scope of review is limited to the PCRA court's factual findings and the evidence of record." *Commonwealth v. Fowler*, 930 A.2d 586, 590 (Pa. Super. 2007). "We must accord great deference to the findings of the PCRA court, and such findings will not be disturbed unless they have no support in the record." *Commonwealth v. Scassera*, 965 A.2d 247, 249 (Pa. Super. 2009), *appeal denied*, 603 Pa. 709, 985 A.2d 219 (2009) (citation omitted).

Furthermore,

the right to an evidentiary hearing on a post-conviction petition is not absolute. *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. *Id.*

⁷ We have re-ordered and rephrased Anzaldi's issues for the ease of our review. Because many of his arguments are redundant and overlap, we address his claims together.

Commonwealth v. Wah, 42 A.3d 335, 338 (Pa. Super. 2012).

Anzaldi's issues challenge the PCRA court's notice of intent to dismiss, which is governed by Pa.R.Crim.P. 907 and provides:

Rule 907. Disposition Without Hearing

Except as provided in Rule 909 for death penalty cases,

(1) the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction relief, and no purpose would be served by any further proceedings, ***the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal within 20 days of the date of the notice.*** The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

Pa.R.Crim.P. 907(1) (emphasis added). Rule 907 notice provides the petitioner with an opportunity to amend his petition by correcting material defects to enable the PCRA court to review the merits of the claims raised. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1189 (Pa. Super. 2012). "The response 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.'" ***Id.*** (citation omitted).

Anzaldi first contends that he was “misled and confused as to his personal rights and responsibilities” based on the reference to “Mr. Smith” in the notice of intent to dismiss, which violated Pa.R.Crim.P. 907(1) by denying him his right to respond and correct any deficiencies in his PCRA petition. Appellant’s Brief at 17. Anzaldi also asserts that if he had been given the opportunity to respond to the notice of intent to dismiss, he would have raised issues sufficient to warrant an evidentiary hearing. *Id.* at 18-19.

The PCRA court’s notice of intent to dismiss is patently incorrect in that it refers to a “Mr. Smith” instead of Anzaldi and to an inapplicable rule of criminal procedure. Moreover, established *Turner/Finley* procedures were not followed. Anzaldi claims that he was confused and that he did not understand that he could respond *pro se* to the notice, thereby depriving him of his right to respond and correct any deficiencies in his PCRA petition. While the PCRA court concluded in its 1925(a) opinion that it did not believe Anzaldi’s claimed confusion (Trial Court Opinion, 8/27/2012, at 2), the evidence before the PCRA court, *i.e.*, the patent error in the Rule 907(1) notice and other missteps of record, does not support this conclusion.

We likewise note the Commonwealth’s recognition of the irregular state of the record and proceedings in this case:

However, based on the bizarre procedural history of this case and the numerous oversights and the resulting opportunity for confusion, compounded by

some unfortunate typographical errors by the lower court, the Commonwealth acknowledges that this Court may find it appropriate to remand to allow [Anzaldi] the opportunity to respond to the [n]otice of [i]ntent to [d]ismiss.

Appellee's Brief at 12.

In light of the foregoing, we vacate the PCRA court's order dismissing Anzaldi's PCRA petition without a hearing and remand so that Anzaldi may file his response to the notice of intent to dismiss.⁸

Order vacate. Case remanded. Jurisdiction relinquished.

⁸ Due to our disposition of Anzaldi's first argument on appeal, we do not reach the merits of his remaining claims.