

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
RASHEE TYREE DANIELS,	:	
	:	
Appellant	:	No. 2470 EDA 2011

Appeal from the PCRA Order August 23, 2011,
Court of Common Pleas, Bucks County,
Criminal Division at No. CP-09-CR-0006173-2010

BEFORE: DONOHUE, MUNDY and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED MAY 28, 2013

Appellant, Rashee Tyree Daniels (“Daniels”), appeals from the order of court denying his request for relief pursuant to the Post Conviction Relief Act, 42 Pa. C.S.A. §§ 9541-46 (“PCRA”). For the reasons that follow, we vacate the trial court’s order and remand the case for further proceedings consistent with this decision.

In its written opinion filed pursuant to Pa. R.A.P. 1925(a), the PCRA court aptly summarized the relevant procedural background of this case as follows:

On November 29, 2010, Daniels pled [*sic*] guilty to thirty-nine criminal charges: nine counts of Robbery, seven counts of Theft by Unlawful Taking, seven counts of Receiving Stolen Property, four counts of Conspiracy, four counts of Simple Assault, three counts of Recklessly Endangering Another Person, three counts of Terroristic Threats, and two counts [of] Aggravated Assault. Daniels received

nine separate ten to twenty year sentences on each count of Robbery, each to be served concurrent to one another, and a consecutive ten year probation for the two counts of Aggravated Assault.

On April 14, 2011, Daniels timely filed a PCRA Petition. Attorney [Ronald H.] Elgart was appointed to represent Daniels throughout his PCRA Review. The Commonwealth filed a response to Daniels' PCRA Petition, and shortly thereafter, Attorney Elgart filed a **Turner/Finley** letter with this [c]ourt. A hearing was held on Daniels' PCRA Petition on August 23, 2011. On that same day, this [c]ourt issued an Order denying Daniels' requested relief and permitting Attorney Elgart to withdraw. Daniels filed a timely Notice of Appeal on September 8, 2011. This [c]ourt issued an order on September 27, 2011, directing Daniels to file a Statement of Matters Complained of on Appeal in compliance with Pa. R.A.P. 1925(b) within twenty-one days. Daniels never filed the required Statement of Matters Complained of on Appeal. Based on Daniels' failure to file a brief, the Superior Court dismissed the appeal on April 23, 2012.

However, on July 16, 2012, Daniels' *pro se* motion for reconsideration of the Superior Court's prior order dismissing his appeal was granted and his appeal was therefore reinstated. Daniels was appointed new counsel, Attorney Wilder. After several filing extensions, Daniels' counsel filed a Statement of Matters Complained of on Appeal on November 20, 2012.

Trial Court Opinion, 12/12/12, at 1-2.

On appeal, Daniels presents a single issue for our consideration and determination:

Is the Commonwealth wrong for insisting that [Daniels'] is not entitled to counsel who will properly represent his interests in PCRA proceedings[.]

Daniels' Brief at 3.

The trial court is in agreement with Daniels that this appeal is governed by this Court's recent decision in **Commonwealth v. Willis**, 29 A.3d 393 (Pa. Super. 2011). In **Willis**, the appellant filed a *pro se* PCRA petition and counsel (Attorney Elgart) was appointed for him by the PCRA court.¹ Attorney Elgart did not file an amended PCRA petition and instead, prior to the scheduled PCRA evidentiary hearing, filed a petition to withdraw and **Turner/Finley** no-merit letter, in which he represented to the PCRA court that all of the appellant's issues were meritless. The PCRA court did not rule on the petition to withdraw prior to the evidentiary hearing, and thus Attorney Elgart represented the appellant at that hearing. The appellant then filed a *pro se* amended PCRA petition, and the PCRA court scheduled a second evidentiary hearing. Once again, prior to the evidentiary hearing, Attorney Elgart filed a petition to withdraw and a **Turner/Finley** no-merit letter, but the PCRA court did not rule on the petition and allowed Attorney Elgart to represent the appellant at the hearing. After the second evidentiary hearing, the PCRA court issued an order denying the appellant's amended PCRA petition and granting Attorney Elgart's petition to withdraw.

¹ The appointed counsel (Ronald H. Elgart) and the PCRA court judge (the Honorable Jeffrey L. Finley) in **Willis** are the same appointed counsel and PCRA court judge in the present case on appeal.

On appeal, this Court ruled that the actions of Attorney Elgart and the PCRA court effectively denied the appellant of his constitutional right to counsel.

First, Attorney Elgart violated his duty to continue to represent Appellant until the court ruled on his petitions to withdraw. In ***Commonwealth v. White***, 871 A.2d 1291 (Pa. Super. 2005), we stated that 'once counsel has entered an appearance on a defendant's behalf he is obligated to continue representation until the case is concluded or he is granted leave by the court to withdraw his appearance.' ***Id.*** at 1294 (citations omitted). Instantly, Attorney Elgart petitioned to withdraw prior to each of Appellant's PCRA hearings, yet the court chose not to rule on Attorney Elgart's petitions before conducting those proceedings. Consequently, Attorney Elgart was duty-bound to act as Appellant's counsel; however, the transcripts of the PCRA hearings are replete with evidence that he was not advocating on Appellant's behalf. Instead, it appears that he was attempting to prove that Appellant's claims were meritless, presumably to persuade the court to grant his request to withdraw.

For instance, during his direct examination of Appellant at the August 9, 2010 proceeding, Attorney Elgart's questioning was more in-line with a cross-examination than an attempt to draw out any merit in his client's contentions. The following portions of the transcript demonstrate this point:

[Attorney Elgart]: And sir, you're aware that I have filed what's known as a no-merit letter in regards to the issues you raised in your initial petition, correct?

[Appellant]: Yes, sir.

[Attorney Elgart]: Now, sir, can you explain why you believe the [c]ourt was not allowed to impose the sentence it did?

[Appellant]: On count number 2 of homicide by vehicle, the Commonwealth of Pennsylvania requires a cause of death. I was never found guilty of a cause of death, which would make that charge vacate.

[Attorney Elgart]: Sir, you're aware there is no separate charge called "cause of death?"

[Appellant]: No, there isn't, but there is no charge that is initially in the law books that states that it is a cause of death, but there are charges which do cause death.

[Attorney Elgart]: That involve a cause of death, correct?

[Appellant]: Yes.

[Attorney Elgart]: What specifically, sir, is your complaint, as this case concluded with a plea of guilty?

[Appellant]: Well, when I pled guilty to these charges I had went with involuntary manslaughter, reckless endangerment of a person, reckless driving, and disregarding traffic lanes were all no pros [*sic*], which would give them cause of death to make homicide by vehicle—

[Attorney Elgart]: Sir, you're aware all these charges were nolle prossed as part of the plea bargain involving in your entering a plea of guilty to the charges?

[Appellant]: And that's the reason I pled guilty....

N.T. PCRA Hearing, 8/9/10, at 9–11. Moreover, later in the proceeding, Attorney Elgart stated the following to Appellant:

[Attorney Elgart]: Sir, let me explain something, and it's simply this: This is your evidentiary hearing. **This is where you have to establish your issues and the evidence to support those issues.** This is it.

Id. at 16–17 (emphasis added).

Additionally, we note that at the August 9, 2010 hearing, Attorney Elgart did not call Appellant's plea counsel, Attorney Faust, to the stand, despite the fact Appellant was challenging her effectiveness and she was present in the courtroom to testify. *Id.* at 22. Even more disconcerting is the fact that when the Commonwealth called Attorney Faust as a witness and completed its direct examination, Attorney Elgart declined the opportunity to cross-examine Attorney Faust, stating that he had no questions for her. *Id.* at 29.

Similarly, the transcript of the November 22, 2010 PCRA hearing supports our conclusion that Attorney Elgart violated his obligation to represent Appellant. During that proceeding, Appellant claimed that he was on medication at the time he entered his plea, which inhibited his ability to understand what was taking place during the guilty plea proceeding. Appellant once again challenged Attorney Faust's effectiveness as plea counsel, averring that she did not follow up on his claims that he pled guilty due to threats he and his family were receiving. He also averred that Attorney Faust ineffectively made decisions in his case without discussing those choices with him.

Once again, despite Appellant's allegations of Attorney Faust's inadequate representation, Attorney Elgart chose not to call Attorney Faust as a witness during the PCRA proceeding. N.T. PCRA Hearing,

11/22/10, at 24. Moreover, when the Commonwealth called Attorney Faust to the stand, Attorney Elgart's cross-examination consisted of the following, in relevant part:

[Attorney Elgart]: [Attorney] Faust, we touched on it briefly at the last PCRA evidentiary hearing, but again it's been reiterated today that [Appellant's] medical condition, the fact he was on medication affected his ability to understand what was going on in the courtroom. Again, did [Appellant] have any problems understanding what you were telling him?

[Attorney Faust]: I have no recollection of him even telling me he was on medication. There was nothing about my encounters with him that would have raised that as a red flag.... And I certainly didn't believe that he was in any way impaired during this—during the time leading up to and during the plea.

[Attorney Elgart]: And just to make it clear, after he talked to you about these threats with his wife, you continued to do an investigation of the case?

[Attorney Faust]: Yes.

[Attorney Elgart]: And after he initially brought that up to you, did he ever bring it up to you again?

[Attorney Faust]: No.

[Attorney Elgart]: Can you state whether or not you made any decisions on [Appellant's] behalf without consulting with him or without his knowledge?

[Attorney Faust]: Absolutely not.

[Attorney Elgart]: I have nothing further.

Id. at 30–32.

We conclude that the above-quoted portions of the PCRA hearings reveal that Attorney Elgart was not advocating on Appellant's behalf but, instead, was attempting to prove to the court that Appellant's claims were meritless in order to encourage the court to grant his pending petitions to withdraw. Accordingly, Appellant was effectively denied his right to counsel in his first PCRA petition and, consequently, the court's November 23, 2010 order denying Appellant's PCRA petition cannot stand. **Commonwealth v. Albrecht**, 554 Pa. 31, 720 A.2d 693, 699 (1998) (stating that '[t]he denial of PCRA relief cannot stand unless the petitioner was afforded the assistance of counsel').

* * *

Before leaving this issue, however, we note that the PCRA court is also at fault for denying Appellant his right to counsel. First, the court failed to reprimand Attorney Elgart, or appoint new counsel, when it became clear that Attorney Elgart was not advocating on Appellant's behalf. Furthermore, we note our displeasure with the PCRA court's act of conducting Appellant's PCRA hearings prior to ruling on Attorney Elgart's petitions to withdraw. This decision essentially pitted Attorney Elgart and Appellant against one another, as evidenced by the fact that Attorney Elgart advocated against Appellant's interests at both hearings.

In sum, the fact that Appellant was effectively denied his right to counsel in his first PCRA petition requires us to vacate the court's November 23, 2010 order denying his petition.

Id. at 397-400.

The present case mirrors **Willis** in every relevant respect. Attorney Elgart filed a **Turner/Finley** letter with the PCRA court in advance of the evidentiary hearing. The PCRA court did not rule on the request to withdraw as counsel, leaving Attorney Elgart to serve as Daniels' counsel at that proceeding. At the hearing, Attorney Elgart essentially cross-examined his own client, making every effort to discredit Daniels' attempts to establish that his trial counsel had wrongly induced his guilty pleas with misrepresentations as to the likely sentence he would receive. N.T., 8/23/11, at 7-9. Attorney Elgart did not call Daniels' trial counsel (Attorney William Penglase) to testify, even though he was in the courtroom. Instead, Attorney Elgart chose to let the Commonwealth call Attorney Penglase to testify, and then "cross-examined" him with a half dozen "softball" questions specifically designed to prove to the PCRA court that Daniel's claims were meritless. **Id.** at 20-22.

Immediately following this "cross-examination", Attorney Elgart then made the following statement in closing: "Your Honor, I submitted a **Turner/Finley** letter back on May 27. I've heard nothing here today which changes my opinion that the issues raised here are entirely without merit, and I'd ask that the [c]ourt, after its own review, to basically permit me to withdraw from this matter." **Id.** at 22. On the record, the PCRA court then dismissed Daniels' amended PCRA petition and granted Attorney Elgart's

request to withdraw. *Id.* at 23-24. An order memorializing the same was issued later the same day.

In its Pa.R.A.P. 1925(a) opinion, the PCRA court does not contest that *Willis* governs the present case:

Daniels' hearing in this matter was held prior to the Superior Court's Opinion in *Commonwealth v. Willis*. This [c]ourt recognizes that Daniels is likely entitled to a new PCRA hearing under the holding of *Commonwealth v. Willis*. It appears this [c]ourt erred in failing to rule on Attorney Elgart's motion to withdraw prior to the PCRA hearing in this matter. Furthermore, given that Attorney Elgart's interests were inapposite to those of this client[,] his representation of Daniels during the PCRA hearing was similar to the representation held to be deficient in *Willis*. Therefore, this [c]ourt seeks remand of Daniels' case, in order to provide Daniels with a new PCRA hearing.

Trial Court Opinion, 12/12/12, at 3.

In its appellate brief, the Commonwealth concedes that it was error for the PCRA court not to rule on Attorney Elgart's request to withdraw prior to the evidentiary hearing, and "further concedes that some of the concerns raised in *Willis* were present during the hearing." Commonwealth's Brief at 8. The Commonwealth contends, however, that Daniels was not prejudiced by these failures because the allegations in his amended PCRA petition regarding advice from his counsel are contradicted by his representations during his plea colloquy. *Id.* at 8-10. As such, the Commonwealth argues the PCRA court should have dismissed Daniels' amended PCRA petition

without an evidentiary hearing, and that as a result the failures of the PCRA court and Attorney Elgart at that hearing were not prejudicial to Daniels. ***Id.*** at 9.

We disagree. If counsel's ineffectiveness causes a defendant to enter an involuntary or unknowing guilty plea, then that defendant is entitled to relief under the PCRA. ***See, e.g., Commonwealth v. Hickman***, 799 A.2d 136, 141 (Pa. Super. 2002). Accordingly, when a PCRA petitioner asserts that his plea counsel was ineffective for unlawfully inducing a guilty plea, it is necessary for the PCRA court to conduct an evidentiary hearing to establish what advice, if any, counsel furnished regarding the decision to enter a plea. ***Commonwealth v. Barbosa***, 819 A.2d 81, 87 (Pa. Super. 2003) (reversing the order dismissing the PCRA petition and remanding for an evidentiary hearing on the merits of the petition). Accordingly, it was not error for the trial court to conduct an evidentiary hearing on Daniels' PCRA claims in this case, and we will therefore remand this case to the PCRA court for that purpose after disposing of any ***Turner/Finley*** issues.

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

Judgment Entered.

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

Prothonotary

Date: 5/28/2013

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