

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

EARL JOHN GLYNN

Appellant

No. 2562 EDA 2012

Appeal from the Order June 28, 2011
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0000685-2010

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

FILED MAY 29, 2013

Earl John Glynn appeals from the portion of the order of the Court of Common Pleas of Monroe County, dated June 28, 2011, that denied his petition for relief under the Post-Conviction Relief Act.¹ For the reasons set forth herein, we quash the appeal.

The relevant procedural history of this case has been set forth by this Court in a related appeal by Glynn:

On June 22, 2010, [Glynn] pleaded guilty to failure to register as a sexual offender, and on September 1st, the court imposed a sentence of two to four years' incarceration. [Glynn] took a *pro se* appeal, which was quashed by this Court on December 6, 2010, as untimely.

On March 4, 2011, [Glynn] filed a timely *pro se* PCRA petition, arguing:

¹ 42 Pa.C.S. §§ 9541-46.

1) Trial counsel was ineffective as [Glynn's] plea was not valid; 2) trial counsel was ineffective in failing to inform [him] what options or rights he had and [the] possible sentence[s]; 3) the sentence imposed was not in conformity with [his] guilty plea agreement; and 4) trial counsel was ineffective in that [Glynn's] post-sentence and appellate rights were not handled by his counsel "as the sentencing Judge directed upon imposition of sentence."

Trial Ct. Op., 6/28/11, at 3.

The Court appointed Jason Leon, Esq. to represent [Glynn] and granted him "leave to file an amended petition to cure any defects in [Glynn's] *pro se* petition." *Id.* at 2. Attorney Leon filed a motion for an evidentiary hearing, which indicated he would not file an amended PCRA petition. The court held evidentiary hearings on June 13 and 20, 2011, at which [Glynn's] trial counsel testified, and the issues raised in [Glynn's] PCRA petition were litigated.

On June 28, 2011, the trial court denied relief of the first three issues in [Glynn's] PCRA petition, and granted relief on the remaining issue as follows: "[Glynn's] post-sentence and appellate rights are reinstated *nunc pro tunc*[" Order, 6/28/11.

[Glynn] filed a timely post-sentence motion on July 8, 2011, which requested: (1) reconsideration of his sentence; and (2) review of the ineffectiveness claims raised in his PCRA petition and a subsequently filed brief in support thereof. The Court held a hearing on July 22nd. On November 3rd, it issued an order denying [Glynn's] post-sentence motion."

Commonwealth v. Glynn, No. 3169 EDA 2011, unpublished memorandum at 2-3 (Pa. Super. filed July 24, 2012).

On appeal from his judgment of sentence, this Court noted that Glynn had failed to raise any sentencing claim, although he raised one below in his *nunc pro tunc* post-sentence motion. Rather, the only claims he raised involved ineffective assistance of counsel. Because the record did not show that Glynn had expressly, knowingly and voluntarily waived PCRA review,

this Court held that it could not engage in review of the ineffective assistance of counsel claims on direct appeal. **See Commonwealth v. Barnett**, 25 A.3d 371 (Pa. Super. 2011).

His judgment of sentence having been affirmed by this Court on July 24, 2012, Glynn now appeals the portion of the trial court's June 28, 2011 order that denied his claims of ineffective assistance of counsel under the PCRA. He raises the following issues for our review:

1. Was it ineffective assistance of counsel to fail to obtain, review, and analyze discovery related to . . . Glynn's underlying charges in Connecticut to determine whether . . . Glynn was, in fact, guilty of the crimes charged?
2. Was it ineffective assistance of counsel to fail to discuss withdrawing of . . . Glynn's guilty pleas given the likelihood that the Commonwealth could not establish his guilt?

Brief of Appellant, at 5.

For the reasons set forth in **Commonwealth v. Miller**, 868 A.2d 578 (Pa. Super. 2005), we are unable at this time to reach the issues Glynn raises.

When a PCRA court grants a request for reinstatement of direct appeal rights *nunc pro tunc*, it may address, but not "reach" the merits of any remaining claims. **Commonwealth v. Hoyman**, 385 Pa. Super. 439, 561 A.2d 756, 758 (1999). This delicate distinction has caused some confusion. **See Commonwealth v. Pate**, 421 Pa. Super. 122, 617 A.2d 754, 757-58 (1992) ("once the PCRA court finds the petitioner's appellate rights have been abridged, it should grant leave to file a direct appeal and end its inquiry there.") The PCRA court may inquire, but its inquiry cannot result in an appealable disposition.

* * *

[Once] the [PCRA] court decides the accuracy of the deprivation of appellate rights claim and grants the *nunc pro tunc* appeal, its review of any remaining claims would not be considered final review of the issues, but would only be seen as serving the evidentiary purpose of completing the record for appellate review. As such, the evidentiary review would not result in a separate appealable order.

Miller, 868 A.2d at 579-80.²

Because there was no separate appealable order denying Glynn's ineffective assistance of counsel claims, we are precluded from reaching the merits of those claims. Rather, he must raise these claims in a timely filed PCRA petition.³ **See** 42 Pa.C.S. § 9545(b).

² In **Miller**, this Court reviewed the claims of ineffective assistance of counsel on direct appeal "because the trial court heard argument on this issue, issued an opinion addressing it and the parties have briefed it for this Court." **Miller**, 868 A.2d at 581. In reaching this determination, this Court relied on the exception set forth in **Commonwealth v. Bomar**, 826 A.2d 831 (Pa. 2003), which allowed review of ineffectiveness claims on direct appeal where a sufficient record concerning the claims had been established. In light of the Court's decision in **Commonwealth v. Barnett**, 25 A.2d 371 (Pa. Super. 2011), such review is unavailable on direct appeal absent waiver of PCRA review by a defendant.

³ Assuming that Glynn files a timely PCRA petition, we draw the attention of the parties and the court to the following portion of our **Barnett** opinion:

Assuming Barnett proceeds further and raises the same claims in his new PCRA petition . . . nothing precludes the PCRA court from disposing of Barnett's ineffective assistance claims based on the previously-established record. Thus, our decision here does not mandate duplicative proceedings.

Barnett, 25 A.3d at 376.

J-S21033-13

Appeal quashed.

Judgment Entered.

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

Prothonotary

Date: 5/29/2013