NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
MARK DAVID MULLER JR.,	:	
Appellant	:	No. 260 MDA 2013

Appeal from the PCRA Order January 14, 2013
In the Court of Common Pleas of Adams County
Criminal Division No(s).: CP-01-CR-0000838-2010

BEFORE: BENDER, LAZARUS, and FITZGERALD,[*] JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 13, 2013**

Appellant, Mark David Muller, Jr., appeals from the order of the Adams County Court of Common Pleas that denied his timely first Post Conviction Relief Act[1] ("PCRA") petition. Present counsel for Appellant has filed in this Court a petition to withdraw from representation and a no-merit letter.[2] We affirm and grant counsel's petition to withdraw.

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[*] Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

[2] ***See Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). Counsel has filed his petition to withdraw and no-merit letter under the cover of a "Brief for Appellant," and did not file a separate petition to withdraw.

The PCRA court set forth the procedural history of this matter and evidence presented at the PCRA hearing as follows:

> Following a jury trial, [Appellant], was found guilty of aggravated assault, recklessly endangering another person, and criminal conspiracy.[1] On December 23, 2010, Muller was sentenced to no less than four and one-half years nor more than ten years of incarceration for aggravated assault and a concurrent term of no less than three years nor more than ten years of incarceration for criminal conspiracy. The recklessly endangering conviction merged with the aggravated assault for sentencing purposes. [Appellant] timely filed Post Sentence Motions which were denied on January 5, 2011. Thereafter, [Appellant] filed direct appeal with the Superior Court. By Memorandum Opinion filed October 14, 2011, the judgment of the trial court was affirmed. [***Commonwealth v. Muller***, 248 MDA 2011 (unpublished memorandum) (Pa. Super. Oct. 14, 2011). Appellant was represented at trial by Stephen Maitland, Esq.]
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> [[1] 18 Pa.C.S. §§ 2702, 2705, and 903].
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> On December 5, 2011, [Appellant] filed a timely pro se Petition for Post Conviction Relief. The petition raised three grounds: (1) prosecutorial misconduct in withholding evidence; (2) ineffectiveness of trial counsel in failing to object to trial evidence not disclosed during pre-trial discovery; and (3) juror misconduct. [Present] Counsel was appointed to represent [Appellant] and pre-hearing conference was conducted on February 13, 2012.
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> During the pre-hearing conference, [Appellant] expanded his claims to include: (1) ineffectiveness on the part of trial counsel to interview and secure a statement from the co-defendant [John Shelleman, Jr.] which would have been exculpatory; (2) ineffectiveness on the part of trial counsel in failing to call other exculpatory witnesses at trial; (3) ineffectiveness of trial counsel in failing to adequately cross-examine the co-defendant and victim concerning their prior criminal history; (4) ineffectiveness

on the part of trial counsel in failing to adequately cross-examine investigating police officers concerning alleged deficiencies in their police reports; and (5) juror misconduct. [Appellant] abandoned his claims of prosecutorial misconduct and trial counsel ineffectiveness based on failure to raise discovery violations. At [Appellant's] request, a second pre-hearing conference was scheduled and he was granted opportunity to allege further issues.

A second pre-hearing conference was held on May 14, 2012. At that time, [Appellant] reconfirmed his intent to pursue the issues waived at the previous pre-[hearing] conference. Additionally, he raised a claim of trial counsel ineffectiveness based upon counsel's alleged failure to object to improper argument at trial. Additionally, [Appellant] claimed trial counsel ineffectiveness in advising him to reject a plea offer and proceed to trial.

On August 21, 2012, the Court conducted a P.C.R.A. hearing. During the course of the hearing, a witness called on behalf of [Appellant] suffered an emergency medical condition while testifying. Hearing was immediately recessed and reconvened on September 20, 2012. At the subsequent hearing, [Appellant] abandoned all issues with the exception of his claim that trial counsel provided improper advice during plea discussions.[ ]

In support of his claim, [Appellant] testified that on the morning of trial, he was offered a negotiated sentence of two to four years in exchange for his guilty plea. He claimed that he thought the offer was fair and thought that it was in his best interest to accept the plea offer. [Appellant] related that he talked about the elements of the charges with trial counsel and was given misleading advice concerning the elements of conspiracy and the definition of malice. He claimed that during discussions, plea counsel advised him that it was in his best interest to proceed to trial. While ultimately recognizing that it was his decision, he claims to have trusted the advice of counsel and proceeded to trial. During cross-examination, [Appellant] indicated that during the incident, his actions were limited to protecting the victim of the assault. He

claimed he neither intended to assault the victim nor enter an agreement to assault the victim.

[Appellant] also offered at hearing the testimony of his mother, Wanda Warner ("Warner"). At the initial hearing, Warner began her testimony by indicating that trial counsel spoke with her son about a plea offer of two to four years and that he advised her son it would be in his best interest to take the plea. Shortly thereafter during the course of her testimony, Warner had a medical emergency and the hearing was recessed to another date. At the subsequent reconvened hearing, Warner did not take the witness stand but rather submitted an affidavit signed by her which [Appellant] moved into evidence. Although the Commonwealth did not object to the form of the evidence, they stipulated only that the affidavit contained a summary of what Warner would testify to if called as a witness and the testimony therefore could be viewed as presented through proper means. In the affidavit, Warner claims that [Appellant] wished to accept the Commonwealth's offer, however, did not do so because he was advised by trial counsel that he would "beat" the charges at trial.

[Appellant's] final witness at hearing was Ron Miller ("Miller"). Miller recounted hearing trial counsel speak to Warner prior to trial. He indicated during that conversation, trial counsel stated that "[Appellant] was correct not to take the plea bargain." Miller further explained that trial counsel opined that, at worst, [Appellant] was looking at two to four years and he would be home by Christmas.

The Commonwealth's sole witness at [the] hearing was trial counsel, Stephen Maitland ("Maitland"). Maitland represented that he met with [Appellant] approximately 12 times prior to trial during which they discussed trial strategies. Included in those discussions was the concern that the testimony of a co-defendant was damaging to [Appellant]. Nevertheless, on each occasion, [Appellant] insisted that he wished to proceed to trial. A few days prior to trial, Maitland explained that the Commonwealth provided a police report which contained statements allegedly made by [Appellant] of which Maitland was

> previously unaware. Maitland explained this additional evidence caused him concern as to the likelihood of a favorable verdict following trial and that he expressed this concern to [Appellant]. Although also concerned about this additional information, [Appellant] remained adamant on his desire to go to trial. On the morning of trial, Maitland indicated he discussed the Commonwealth's revised offer of a negotiated two to four year sentence with [Appellant]. According to Maitland, [Appellant] considered the same and actually began completing a written guilty plea colloquy. Nevertheless, he remained unconvinced that his co-defendant would testify against him. Rather, Maitland explained that [Appellant] firmly believed that his co-defendant would ultimately exculpate him and solely accept responsibility for the victim's injuries. During the course of completing the plea colloquy, Maitland testified that [Appellant] concluded he "can't do it" and directed Maitland "let's go to trial."

PCRA Ct. Op., 1/14/13, at 1-5 & n.1.

The PCRA court, on January 14, 2013, denied Appellant's request for post-conviction relief. Appellant filed a timely notice of appeal and complied with the court's order to file a Pa.R.A.P. 1295(b) statement.

Present counsel has submitted in this Court a petition to withdraw from representation. ***See*** "Brief for Appellant." Therefore, we must first determine whether counsel complied with the procedures for seeking withdrawal. ***See Commonwealth v. Doty***, 48 A.3d 451, 454 (Pa. Super. 2012).

This Court has stated:

> The ***Turner/Finley*** decisions provide the manner for post-conviction counsel to withdraw from representation. The holdings of those cases mandate an independent review of the record by competent counsel before a PCRA court or appellate court can authorize an attorney's

> withdrawal. The necessary independent review requires counsel to file a "no-merit" letter detailing the nature and extent of his review and list each issue the petitioner wishes to have examined, explaining why those issues are meritless. The PCRA court, or an appellate court if the no-merit letter is filed before it, then must conduct its own independent evaluation of the record and agree with counsel that the petition is without merit.
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> . . . [C]ounsel is [also] required to contemporaneously serve upon his client his no-merit letter and application to withdraw along with a statement that if the court granted counsel's withdrawal request, the client may proceed *pro se* or with a privately retained attorney. . . .

Commonwealth v. Rykard, 55 A.3d 1177, 1184 (Pa. Super. 2012), *appeal denied*, 64 A.3d 631 (Pa. 2013).

Instantly, present counsel filed only an "Brief for Appellant," which contained a purported petition for withdrawal and no-merit letter, but did not file a separate petition in this Court. Nevertheless, in the petition to withdraw in his brief, counsel states he mailed Appellant a copy of his no-merit letter. His no-merit letter, in turn, set forth a summary of the issues Appellant intended to raise, the issue considered at the evidentiary hearing, and the extent of counsel's review. Counsel apprised Appellant, "[Y]our issues have been addressed at the PCRA hearing, and in [his] opinion . . . are without merit." Letter from Thomas R. Nell, Esq. to Appellant, 5/11/13, at 5 ("No-Merit Letter"). Lastly, counsel apprised Appellant that he "will be filing a Motion to withdraw as counsel[ ]" and that "[i]n the event the court grants the application for me to withdraw as counsel, you have the right to proceed *pro se* or with the assistance of privately retained counsel." ***Id.***

Appellant has not responded to counsel's no-merit letter or filed a brief in this Court.

Following our review, we conclude that present counsel has substantially complied with the requirements for seeking withdrawal in this Court.[3] ***See Rykard***, 55 A.3d at 1184. Therefore, we will proceed to consider that the sole issue identified by counsel in this appeal: whether the PCRA court erred in denying Appellant relief on his claim that prior counsel was ineffective for advising him not to accept a negotiated plea. ***See*** "No-Merit Letter" at 3-4.

Our review of an order denying PCRA relief "is limited to the findings of the trial court and the evidence of record[, and w]e will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error." ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa. Super. 2012), *appeal denied*, 64 A.3d 631 (Pa. 2013). "The findings of a post-conviction court, which hears evidence and passes on the credibility of witnesses, should be given great deference." ***Commonwealth v. Jones***, 912 A.2d 268, 293 (Pa. 2006). "In addition, where a PCRA court's credibility determinations are supported by the record, they are binding on the

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[3] We caution counsel of the need to title his brief properly and file a separate petition to withdraw to avoid future confusion.

reviewing court." ***Commonwealth v. White***, 734 A.2d 374, 381 (Pa. 1999).

Pennsylvania has recognized a defendant's right to effective counsel when rejecting a proposed plea agreement and proceeding to trial. ***See Commonwealth ex rel. Dadario v. Goldberg***, 773 A.2d 126, 128, 131 (Pa. 2001) (holding claim that counsel failed to advise defendant of correct sentencing guideline prior to his rejection of Commonwealth's plea offer presented a cognizable claim of ineffective assistance of counsel). An ineffectiveness of counsel claim, in turn, generally requires that a PCRA petitioner prove, by a preponderance of the evidence, that "(1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission." ***See Commonwealth v. Johnson***, 966 A.2d 523, 533 (Pa. 2009) (discussing "performance and prejudice test" under ***Strickland v. Washington***, 466 U.S. 688 (1984)).

More recently, in ***Lafler v. Cooper***, 132 S.Ct. 1376 (2012), and ***Missouri v. Frye***, 132 S.Ct. 1399 (2012), the United States Supreme Court recognized a similar right to effective counsel in plea negotiations and considered claims that "the ineffectiveness of counsel caused the rejection of a plea leading to trial and a more severe sentence." ***Lafler***, 132 S.Ct. at 1388. The Court concluded that counsel's performance must be assessed using the ***Strickland*** test and requires a defendant show, *inter alia*, "that

counsel's representation fell below an objective standard of reasonableness" and "prejudice." ***See Lafler***, 132 S.Ct. at 1384; ***Frye***, 132 S.Ct. at 1404. With respect to the prejudice prong, the Court determined that "[t]o show prejudice . . . defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." ***Frye***, 132 S.Ct. at 1409; ***see also Lafler***, 132 S.Ct. at 1384 (noting, "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice"). However, the Court left open the precise duties of defense counsel with respect to plea negotiations. ***See Frye***, 132 S.Ct. 1408 (holding only that failure to communicate formal plea offer was ineffective representation); ***Lafler***, 132 S.Ct. at 1384 (noting that parties conceded defense counsel's performance was deficient).

Instantly, our review of the record confirms that Appellant pursued a single issue at the PCRA evidentiary hearing: namely, that prior counsel dissuaded him from accepting a pretrial plea offer to serve two to four years' imprisonment. Our review further reveals that the determinative issue before the PCRA court was a factual question. Specifically, the court was required to determine whether counsel dissuaded Appellant from rejecting the plea offer by representing that he could "beat" the charges at trial, that the "worst case scenario" of proceeding to trial was a two to four year

sentence, but that Appellant "would be home for Christmas." ***See*** N.T., 8/21/12, at 5, 8; N.T., 9/20/12, at 6.

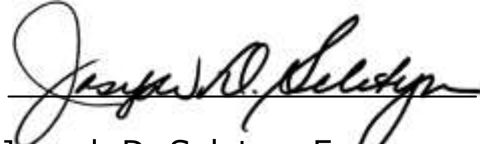
The PCRA court determined that Appellant's evidence that prior counsel dissuaded him from accepting the plea offer was not credible. PCRA Ct. Op. at 6. Moreover, the court "accept[ed] as credible counsel's representation that it was [Appellant] who insisted on going to trial." ***Id.*** The court's findings and credibility determinations were supported by the record. ***See*** N.T., 9/20/12 at 14-15 (indicating prior counsel did not represent that he could win at trial), 15 (indicating prior counsel did not make predictions regarding sentences following trial or promise when Appellant would return home); 18 (indicating although counsel did not recall offer for two to four years imprisonment, he "probably would have recommended it"); 24 (indicating counsel recalled that Appellant stated "I can't do it, let's go to trial").

We are bound to the factual and credibility determinations of the PCRA court. ***See Jones***, 912 A.2d at 293; ***White***, 734 A.2d at 381. Thus, given the record before us, we detect no legal error in the conclusion of the court that Appellant failed to demonstrate that, but for the actions of counsel, there was a reasonable probability he would have accepted the pretrial plea offer. ***See Frye***, 132 S.Ct. at 1409; ***Lafler***, 132 S.Ct. at 1384. Consequently, no relief is due on this claim.

Having conducted an independent review of the record, we detect no further issues for discussion in this appeal.

Order affirmed. Counsel's petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013