

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DAVID PAGE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 298 WDA 2013

Appeal from the PCRA Order January 18, 2013
In the Court of Common Pleas of Lawrence County
Criminal Division at No(s): CP-37-CR-0000442-2006

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.:

FILED JANUARY 15, 2014

David Page appeals from the portion of the order entered on January 18, 2013, in the Lawrence County Court of Common Pleas, that denied, in part, his first petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. On June 15, 2007, Page was convicted by a jury of aggravated indecent assault (without the complainant's consent), aggravated indecent assault (threat by forcible compulsion), indecent assault (complainant is less than 13 years of age), and corruption of minors.¹ On appeal, Page asserts the PCRA court erred in finding that trial counsel was not ineffective for failing to introduce exculpatory evidence, including former

¹ 18 Pa.C.S. §§ 3125(a)(1), 3125(a)(3), 3126(a)(7), and 6301(a)(1), respectively.

employer-witnesses and business records, in order to impeach the credibility of the victim and/or in establishing an alibi defense. Page's Brief at 4. After careful review, we affirm in part and vacate in part.

The facts and procedural history are as follows. Page's convictions stem from incidents occurring between 2003 and 2005, in which Page engaged in sexual contact with the minor daughter of his live-in girlfriend. The jury trial began on June 12, 2007. Three days later, the jury found Page guilty of the above-stated crimes and not guilty of aggravated indecent assault (complainant is less than 13 years of age). On February 28, 2008, Page was deemed to be a sexually violent predator following an evidentiary hearing. That same day, the court sentenced Page to a term of five to ten years' incarceration on the aggravated indecent assault (without the complainant's consent) conviction and a concurrent sentence of six to 12 months' incarceration on the corruption of minors offense.² His judgment of sentence was affirmed on February 9, 2009. ***See Commonwealth v. Page***, 965 A.2d 1212 (Pa. Super. 2009).

Page then filed a *pro se* PCRA petition on March 5, 2010. Counsel was appointed and filed an amended PCRA petition on January 27, 2012. In the amended petition, Page averred that his trial counsel was ineffective in failing to introduce exculpatory evidence in order to establish an alibi

² The court did not impose any further penalty with respect to the remaining convictions.

defense and in failing to file a petition for allowance of appeal to the Pennsylvania Supreme Court. Evidentiary hearings were held on June 5, 2012 and October 2, 2012.

On January 18, 2013, the PCRA court entered an order, reinstating Page's petition for allowance of appeal rights *nunc pro tunc* and denying the other claim on the merits. Page filed a notice of appeal with this Court on February 8, 2013.³ He also filed a petition for allowance of appeal *nunc pro tunc* with the Supreme Court on February 12, 2013.⁴

Our "standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Cintora***, 69 A.3d 759, 762 (Pa. Super. 2013) (quotation omitted).

For the reasons set forth in ***Commonwealth v. Miller***, 868 A.2d 578 (Pa. Super. 2005), *appeal denied*, 881 A.2d 819 (Pa. 2005), we are unable at this time to address the ineffectiveness issue Page raises:

³ On February 11, 2013, the PCRA court ordered Page to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Page filed a concise statement on February 25, 2013. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 4, 2013.

⁴ The Supreme Court denied Page's petition for allowance of appeal *nunc pro tunc* on August 27, 2013. ***See Commonwealth v. Page***, 74 A.3d 125 (Pa. 2013).

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. 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 that 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.

. . . .

[O]nce the [PCRA] court decides the accuracy of the deprivation of [the] 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 579-580 (some citations omitted).⁵ **See also Commonwealth v. Donaghy**, 33 A.3d 12, 14 n.5 (Pa. Super. 2011) (stating that because it reinstated the defendant’s direct appellate rights, *nunc pro tunc*, it would not address the defendant’s other claims, both of which involve the alleged ineffectiveness of trial counsel).

⁵ We note that in **Miller**, a panel of this Court reviewed the defendant’s ineffectiveness claims 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, the panel relied on the exception set forth in **Commonwealth v. Bomar**, 826 A.2d 831 (Pa. 2003), which permitted review of such claims on direct appeal where a sufficient record concerning the claims had been established. However, in light of this Court’s more recent decision in **Commonwealth v. Barnett**, 25 A.3d 371 (Pa. Super. 2011), such review is unavailable on direct appeal absent explicit waiver of PCRA review by a defendant.

Turning to the present matter, because the PCRA court reinstated Page's rights to file a petition for allowance of appeal rights *nunc pro tunc*, it was not permitted to "reach" the underlying issue in his PCRA petition. **See Miller**. The court's attempt to do so was improper. Therefore, we are precluded from deciding the merits of Page's ineffectiveness claim. Rather, he must raise the claim in a subsequently timely filed PCRA petition.⁶ Accordingly, we vacate that portion of the PCRA court's order. As no party challenges the balance of the PCRA court's January 18, 2013 order, it remains undisturbed.

Order affirmed in part and vacated in part. Jurisdiction relinquished.

⁶ We note that Page's sentence became final on November 25, 2013, when the 90-day time limit to file a *writ of certiorari* with the United States Supreme Court expired. **See** 28 U.S.C. § 2101(d); United States Supreme Court Rule 13.1 (petitioner has 90 to file writ of certiorari from state court of last resort); **Commonwealth v. Perrin**, 947 A.2d 1284 (Pa. Super. 2008) (90 days from Pennsylvania Supreme Court denial of relief to file certiorari with United States Supreme Court). Therefore, Page has until November 25, 2014, in which to file his PCRA petition(s). **See** 42 Pa.C.S. § 9545(b)(1).

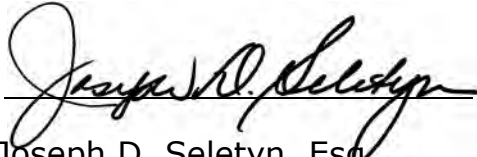
Moreover, assuming Page files a timely PCRA petition, we draw attention of the parties and the PCRA court to the following portion of **Barnett**:

Assuming Barnett proceeds further and raises the same claims in his new PCRA petition, however, 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.

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Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/15/2014