

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

TORRE RANDOLPH,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3096 EDA 2011

Appeal from the Judgment of Sentence January 28, 2010
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0002284-2009

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

FILED MAY 29, 2013

Torre Randolph filed this appeal after the trial court denied, on October 20, 2011, an untimely post-sentence motion that Appellant filed on October 14, 2011. Counsel has moved to withdraw pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). For the reasons outlined *infra*, we deny counsel's petition to withdraw and remand for proceedings consistent with this adjudication.

On January 28, 2010, Appellant entered a negotiated guilty plea to three counts of possession of a controlled substance with intent to deliver. He admitted that he sold cocaine to a confidential informant on three

* Former Justice specially assigned to the Superior Court.

separate occasions between October 26, 2007, and November 9, 2007, in Coatesville, Pennsylvania, pursuant to controlled-buy protocol. That same day, Appellant was sentenced in accordance with the terms of the negotiated guilty plea to six to twelve years imprisonment. No direct appeal was initiated, but twenty-one months later, on October 14, 2011, Appellant filed a *pro se* pleading entitled, "Motion for the Modification/Reduction of Sentence." That motion was denied, without the appointment of counsel, on October 20, 2011.

Appellant filed the present *pro se* appeal from that denial on November 14, 2011. Plea counsel was notified by this Court of the proceedings, counsel was permitted to withdraw, and new counsel was appointed for purposes of this appeal. Appellate counsel, as noted, filed a petition to withdraw from representation and a brief pursuant to **Anders** and **Santiago**, which set forth the procedures for withdrawal during direct appeal. "When presented with an **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." **Commonwealth v. Martuscelli**, 54 A.3d 940, 947 (Pa.Super. 2012). There are both procedural mandates for withdrawal and substantive requirements regarding the contents of a brief that are imposed under **Anders/Santiago**. In order to properly withdraw during direct appeal,

First, counsel must petition the court for leave to withdraw and state that after making a conscientious examination of the record, he has determined that the appeal is frivolous; second,

he must file a brief referring to any issues in the record of arguable merit; and third, he must furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or to himself raise any additional points he deems worthy of the Superior Court's attention.

Santiago, supra at 351. In **Santiago**, the Court outlined the following specific requirements for an **Anders** brief:

[I]n the **Anders** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Id. at 361. Once counsel has satisfied the above mandates:

the court-not counsel-then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 354 (quoting **Anders, supra** at 744).

In this case, counsel averred in his petition to withdraw that he made a conscientious examination of the record, and on that basis, determined the appeal is frivolous. He filed a brief referring to anything in the record that might support an appeal. Attached to the petition to withdraw is a copy of a letter addressed to Appellant and enclosing a copy of the brief and petition

to withdraw. The letter also informs Appellant, "If the Superior Court grants my petition for leave to withdraw as your appellate counsel, you shall have rights to retain new counsel, to proceed *pro se*, and to raise any additional points that you deem worthy of the Superior Court's attention." Application to Withdraw as Counsel, 12/10/12, at Appendix A, page 2. The quoted language does not comport with ***Anders/Santiago*** in that it conveys the impression that Appellant cannot obtain new counsel or respond to present counsel's withdrawal request until after counsel's petition to withdraw is granted. Instead, Appellant has the immediate right to respond to counsel's withdraw request either *pro se* or with the assistance of retained counsel. Hence, counsel's petition is defective on this basis.

Counsel's brief does comply with the ***Anders/Santiago*** mandates in that counsel sets forth a summary of the procedural history and facts, with citations to the record. The brief also contains two issues that counsel believes potentially support the appeal, and counsel's document delineates reasons for believing that both those issues and, thus, the appeal is frivolous. Counsel also provides this Court with the applicable case law demonstrating that the issues are meritless. Specifically, in his brief, counsel correctly notes that since the sentence imposed was the one negotiated pursuant to a guilty plea, Appellant cannot contest it. ***Commonwealth v. Baney***, 860 A.2d 127, 131 (Pa.Super. 2004) (where defendant entered a guilty plea with a negotiated sentence that was

imposed, the defendant “cannot challenge the discretionary aspects of his sentence.”). Next, counsel observes any challenge to the guilty plea must be framed in terms of whether plea counsel was ineffective, which must be entertained under the PCRA. **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002).

However, pursuant to our independent review, which we are required to conduct under the mandates of **Santiago**, we have concluded that there is a meritorious issue that should have been raised herein. The issue relates to the procedural posture of this matter. Appellant’s post-sentence motion, in the first instance, should have been treated as a PCRA petition. Thus, as analyzed *infra*, we conclude that we must vacate the order denying the post-sentence motion and remand for present counsel to either file an amended PCRA petition or a petition to withdraw under the mandates applicable to post-conviction proceedings.

Our analysis follows. With exceptions inapplicable herein, a post-sentence motion must be filed within ten days of imposition of judgment of sentence, Pa.R.Crim.P. 720 (A)(1). Appellant’s judgment of sentence was imposed on January 28, 2010, and the October 14, 2011 motion for modification of his sentence was filed outside of the ten-day window for filing a post-sentence motion. An appeal flowing from denial of an untimely post-sentence motion must be quashed if the appeal was filed, as in the present case, more than thirty days after imposition of sentence. **Commonwealth**

v. Dreves, 839 A.2d 1122 (Pa.Super. 2003) (*en banc*). In fact, the October 14, 2011 motion for modification of sentence was filed long after Appellant's January 28, 2010 judgment of sentence became final on February 28, 2010. Pa.R.A.P. 903(a) (time for taking appeal from order is thirty days).

In light of this factual scenario, Appellant's motion for modification/reduction of his sentence should not have been denied outright. Instead, it should have been treated as a PCRA petition and counsel appointed. The pertinent law follows:

It is . . . well-settled that "the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition." **Commonwealth v. Johnson**, 803 A.2d 1291, 1293 (Pa.Super. 2002) (citation omitted) (concluding the appellant's motion to vacate sentence qualified as a PCRA petition). **See also Commonwealth v. Evans**, 866 A.2d 442 (Pa.Super. 2005) (concluding motion for reconsideration or modification of sentence required treatment under the PCRA); **Commonwealth v. Beck**, 848 A.2d 987, 989 (Pa.Super. 2004) (holding collateral challenge to legality of sentence for failure to credit for time served must be brought under the PCRA); **Commonwealth v. Guthrie**, 749 A.2d 502, 503 (Pa.Super. 2000) (holding motion to correct illegal sentence would be treated as PCRA petition where the appellant did not file timely post-sentence motions or a direct appeal).

Commonwealth v. Fowler, 930 A.2d 586, 591 (Pa.Super. 2007); **accord Commonwealth v. Taylor**, 2013 WL 1694826, 2013 PA Super 2013;¹

¹ In **Taylor**, we did observe the following. There is one Superior Court decision, **Commonwealth v. Glunt**, 61 A.3d 228 (Pa. Super. 2012), wherein the panel suggested that a trial court can choose to treat a post-sentence motion filed after a judgment of sentence is final as not falling (*Footnote Continued Next Page*)

Commonwealth v. Kutnyak, 781 A.2d 1259, 1261 (Pa.Super. 2001) (defendant's "pro se petition, entitled 'Notice of Post-Sentence Motion Challenging Validity of Guilty Plea to Permit Withdrawal, *Nunc Pro Tunc*,' must be treated as a PCRA petition, since the PCRA is the exclusive vehicle for obtaining post-conviction collateral relief" and document was filed five years after imposition of unappealed sentence).

Rather than being treated as a PCRA petition, the document filed by Appellant herein was handled as if it were a post-sentence motion. It was denied prior to the appointment of counsel, and this appeal was treated as a direct appeal from the judgment of sentence. Indeed, in his **Anders/Santiago** brief, counsel asserts that the allegations herein relate to plea counsel's ineffectiveness, which should be entertained under the PCRA.

Since the motion in question, in the first instance, should have been considered a PCRA petition, counsel should have been appointed prior to its denial. **Commonwealth v. Perez**, 799 A.2d 848, 851 (Pa.Super. 2002) ("An indigent petitioner is entitled to appointment of counsel on his first PCRA petition, even where the petition appears untimely on its face.") (citing

(Footnote Continued) _____

within the strictures of the PCRA. In **Taylor**, we observed that **Glunt** "is contradicted by . . . numerous precedents . . . and the language of the PCRA statute itself. **See** 42 Pa.C.S. § 9542." **Commonwealth v. Taylor**, 2013 WL 1694826, 3. It is only when the relief requested in the post-trial motion cannot be framed so as to be cognizable in a PCRA petition that the motion can be treated differently, which is not the case herein.

Commonwealth v. Guthrie, 749 A.2d 502 (Pa.Super. 2000), **Commonwealth v. Ferguson**, 722 A.2d 177 (Pa.Super. 1998), **Commonwealth v. Hampton**, 718 A.2d 1250 (Pa.Super. 1998), and Pa.R.Crim.P. 904). Furthermore, following appointment, PCRA counsel should have filed either an amended PCRA petition or a petition to withdraw in order to address the issue of significance herein, which is whether the October 14, 2011 document was timely filed under the PCRA. **Perez, supra.**

In **Perez**, we held that an attorney appointed to assist the defendant with his first PCRA petition did not provide meaningful representation where the attorney filed an amended PCRA petition that failed to address whether the request for PCRA relief, which was facially untimely, satisfied any of the exceptions to the one-year filing deadline of the PCRA. We noted that a defendant is entitled, as of right, to appointed counsel to assist with a first PCRA petition, and we ruled that “to provide meaningful representation, appointed counsel must at least address the timeliness of a PCRA petition and determine whether the petition fits any exception to the PCRA’s timeliness provision, where the subject petition is untimely on its face.” **Id.** at 849.

Appellant filed the motion at issue herein twenty-one months after the judgment of sentence was imposed. It must be handled, under the pertinent law, as a PCRA petition. The October 14, 2011 motion appears

facially untimely since it was filed more than one year after Appellant's unappealed January 28, 2010 judgment of sentence became final on February 28, 2010. 42 Pa.C.S. § 9545(b)(3) (for purposes of PCRA, judgment of sentence becomes final at end of direct review or when time for seeking such review has expired). Accordingly, counsel herein should have been appointed before the motion was denied, and counsel should have either filed an amended petition invoking an exception under § 9545(b)(1)(i-iii), or filed a petition to withdraw and no-merit letter establishing why none of the exceptions applied. **Id.** (attorney appointed to assist defendant with a facially untimely PCRA petition must investigate whether the petition is indeed untimely, and, if petition is tardy, whether any exception to the PCRA's timeliness provisions can be invoked); **see also Commonwealth v. Taylor**, 933 A.2d 1035, 1042 (Pa.Super. 2007) (applying **Perez**).

Accordingly, based on our independent review, we conclude that counsel has not identified in his brief the meritorious position that this case should be remanded so that counsel can explore whether any of the exceptions to the PCRA's timeliness provisions can be invoked and consult with Appellant about the possibility of PCRA relief. Therefore, we deny counsel's request to withdraw, reverse the order denying the post-sentence motion, and remand for the filing of an amended PCRA petition or petition to withdraw and no-merit letter by present counsel.

J-S09014-13

Petition of John H. Pavloff to withdraw as counsel denied. Order reversed. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Justice Fitzgerald Concurs in the Result. P.J. Stevens files a Dissenting Memorandum.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gumbert", with a horizontal line extending to the right from the end of the signature.

Prothonotary

Date: 5/29/2013