

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA, |  | IN THE SUPERIOR COURT OF<br>PENNSYLVANIA |
| Appellee                      |  |  |
| v.                            |  |  |
| ANTHONY D. SCOTT,             |  |  |
| Appellant                     |  | No. 3134 EDA 2011                        |

Appeal from the PCRA Order October 17, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0702311-2006

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

MEMORANDUM BY STEVENS, P.J.

Filed: March 5, 2013

Anthony Scott (hereinafter "Appellant") appeals from the Order entered in the Court of Common Pleas of Philadelphia County on October 17, 2011, denying his petition filed pursuant to the Post Conviction Relief Act (PCRA).<sup>1</sup> Upon our review of the record, we vacate the PCRA court's Order and remand for further proceedings consistent with this Memorandum.

The PCRA court has set forth the relevant facts and procedural history herein as follows:

On February 8, 2007, [Appellant], was tried via a waiver trial. At the conclusion of the trial, [Appellant] was found guilty of one (1) count of rape, a felony of the first degree; one (1) count of involuntary deviate sexual intercourse ("IDSI"), a felony

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 42 Pa.C.S.A. §§9541-9546.

of the first degree; one (1) count of unlawful contact with a minor, a felony of the first degree; one (1) count of aggravated indecent assault, a felony of the first degree; one (1) count of corruption of minors, a misdemeanor of the first degree; and one (1) count of statutory sexual assault, a felony of the second degree. On October 12, 2007, this [c]ourt sentenced [Appellant] to seven (7) to fourteen (14) years for the rape conviction followed by seven (7) to fourteen (14) years for the IDSI conviction and five (5) years of probation for the aggravated indecent assault conviction.

[Appellant] filed a *pro se* Post Conviction Relief Act ("PCRA") Petition on January 31, 2008. On August 5, 2008, appointed counsel, David S. Winston, Esq., filed a no-merit letter pursuant to Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d, 213 (1988). On September 24, 2008, Mr. Winston withdrew his Finley letter and this [c]ourt reinstated [Appellant's] appellate rights *nunc pro tunc*. On November 19, 2008, Mr. Winston filed a timely 1925(b) statement of matters complained of on appeal and an opinion was filed by this [c]ourt on April 15, 2009. Mr. Winston filed a brief pursuant to Anders v. California<sup>[1]</sup> on June 18, 2009, and the Superior Court ordered this [c]ourt to appoint substitute counsel on June 30, 2009. On November 25, 2009, the judgment of sentence was affirmed.

On February 16, 2010, [Appellant] filed a timely *pro se* PCRA petition. On September 3, 2010, PCRA counsel, J. Matthew Wolfe, Esq., was appointed. On January 3, 2011, counsel filed a Motion for Discovery under the PCRA and on February 2, 2011, the Commonwealth filed [its] Motion in Opposition. On February 12, 2011, this [c]ourt directed the Commonwealth [to] look through its files to see if it had any of the items requested in [Appellant's] discovery motion. On March 7, 2011, the Commonwealth provided PCRA counsel with all of the police reports and DHS records in its possession. On March 25, 2011, this [c]ourt denied [Appellant's] motion for any discovery not previously provided by the Commonwealth.

On June 1, 2011, PCRA counsel filed an amended PCRA petition and on August 1, 2011, the Commonwealth filed a Motion to Dismiss in response to the amended petition. On September 14, 2011, this [c]ourt filed a Dismissal Notice pursuant to Rule 907, and on October 17, 2011, [Appellant's] PCRA Petition was formally dismissed by this [c]ourt. On November 16, 2011, counsel filed a Notice of Appeal and filed a timely Statement of Matters complained of on Appeal on January

18, 2012. On February 2, 2012, [Appellant] filed a *pro se* Motion for Withdrawal of Counsel. A Grazier<sup>2</sup> hearing was held on April 9, 2012, and this [c]ourt denied [Appellant's] request to proceed *pro se*. On June 9, 2012, counsel filed a 1925(b) statement.

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#### FACTS

The complainant, J.W., and her siblings lived in Georgia with their aunt until their father passed away when she was six (6) years old. J.W.'s mother then brought the children to Philadelphia where the family resided with [Appellant]. One evening, while giving her a bath, [Appellant] rubbed between her legs and on her chest. Later that night, [Appellant] entered J.W.'s room and [Appellant] began touching the outside of J.W.'s vaginal area. [Appellant] told J.W. that if she told anyone that he was touching her, he could be put away and it would hurt her family.

When J.W. was seven (7) years old, the touching began to escalate and [Appellant] began to engage in intercourse with J.W. When J.W. was ten (10) years old, she and her family, along with [Appellant], moved to Wellens Street. While living on Wellens Street, [Appellant] continued to rape her. During this time, [Appellant] also began to perform oral sex on the complainant. [Appellant] provided money to J.W.'s family, and after [Appellant] had sex with J.W., he would give her money. While living at Wellens Street, [Appellant] raped J.W. on several occasions in the basement bedroom and afterward would fill a pink object with warm water and peroxide and would squeeze it into her vagina and then wipe J.W. with a towel. When J.W. was in the sixth grade, she told her best friend B.D. that [Appellant] was raping her. B.D. encouraged J.W. to tell someone about what [Appellant] was doing to her.

On April 18, 2006, J.W. was left alone with [Appellant] while her mother went to the doctor. J.W. went down the street to a friend's home so that she would not be alone with [Appellant]. [Appellant] went to the house and told J.W. to

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<sup>2</sup> ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998) (requiring, when waiver of right to counsel is sought at appellate or PCRA stages, on-the-record determination that waiver is knowing, intelligent, and voluntary.

come home because her mother was on the phone. J.W. returned home but her mother was not on the phone. [Appellant] held J.W. down and raped her; following the incident, [Appellant] "cleaned" her vagina with the pink object. After the incident, J.W. called her mother who told J.W. that the family was moving with [Appellant] to New Jersey. After speaking with her mother, J.W. called B.D. and told her that that she believed that she would be raped more frequently after the move. B.D. encouraged J.W. to call the police and report the abuse. Following their conversation, J.W. called the police and reported the abuse. Two (2) police officers arrived at J.W.'s home and took her to the Special Victims Unit to be interviewed by Detective Norma Serrano. While in the detective's office, J.W.'s mother called and informed J.W. that she could not return home.

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<sup>[1]</sup> 386 U.S. 738 (1967).

PCRA Court Opinion, filed 8/24/12 at 1-4.

On June 8, 2012, Appellant filed a counseled Statement of Matters Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b) wherein he raised the three issues developed in his counseled appellate brief. On August 24, 2012, the PCRA court filed its Pa.R.A.P. 1925(a) Opinion.

In his brief, Appellant sets forth the following Summary of Questions Involved:

1. Did the Lower Court err in failing to grant PCRA relief due to trial counsel's ineffectiveness in failing to object to hearsay testimony to the effect that B.D. testified that the complaining witness (J.W.) told her that [] [Appellant] had sexually assaulted and raped her[?]<sup>3</sup>

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<sup>3</sup> We note that in its Opinion, the PCRA court states that this issue has been previously litigated before this Court. PCRA Court Opinion, filed 8/24/12 at 5. However, we note that as Appellant raised claims of ineffectiveness of counsel in his appeal *nunc pro tunc*, this Court dismissed these allegations without prejudice to Appellant's right to raise them in a timely filed PCRA (Footnote Continued Next Page)

2. The Lower Court erred in failing to grant [] Appellant's discovery motion.
3. The Lower Court erred in failing to permit [] Appellant from representing himself.

Brief for Appellant at 8. As our consideration of the final issue is dispositive herein, we discuss it first and begin our analysis with our standard of review:

This Court's 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. ***Commonwealth v. Halley***, 582 Pa. 164, 870 A.2d 795, 799 n. 2 (2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001).

***Commonwealth v. Turetsky***, 925 A.2d 876, 879 (Pa. Super. 2007), *appeal denied*, 596 Pa. 707, 940 A.2d 365 (2007).

***Commonwealth v. Reed***, 42 A.3d 314, 319 (Pa. Super. 2012).

In his third issue, Appellant argues he should have been permitted to represent himself throughout the PCRA proceedings. In this regard, this Court has said:

[p]ursuant to the rules of criminal procedure and interpretive case law, a criminal defendant has a right to representation of counsel for purposes of litigating a first PCRA petition through the entire appellate process. Pa.R.Crim.P. 904(c); ***Commonwealth v. White***, 871 A.2d 1291, 1294–95 (Pa. Super. 2005); ***Commonwealth v. Quail***, 729 A.2d 571, 573 (Pa. Super. 1999). In ***Commonwealth v. Grazier, supra***,

(Footnote Continued) \_\_\_\_\_

petition and affirmed his judgment of sentence. ***Commonwealth v. Scott***, No. 2786 EDA 2008, unpublished memorandum at 4 (Pa. Super. filed November 25, 2009).

the defendant had filed a post-conviction petition, counsel was appointed, and the petition was denied. The defendant then filed a *pro se* appeal and several petitions to proceed *pro se*. We denied the defendant permission and directed counsel to brief the appeal. After we denied relief, the defendant petitioned our Supreme Court for review and again asked to represent himself.

The Court determined that we had erroneously denied the defendant's petitions seeking self-representation. It noted that a criminal defendant has a constitutional right to represent himself and that since the defendant had tendered a timely and unequivocal request to "conduct his appeal *pro se*, it was error to simply deny the request and refer the matter to counsel." *Id.* at 82. The Court expressly continued, however, "When a waiver of the right to counsel is sought at the post-conviction and appellate stages, an on-the-record determination should be made that the waiver is a knowing, intelligent, and voluntary one." *Id.*; *see also Commonwealth v. Brown*, 577 Pa. 315, 845 A.2d 199 (2004) (remanding *per curiam* to the trial court to make on-the-record determination that PCRA petitioner's waiver of counsel for first PCRA petition was "knowing, intelligent and voluntary").

*Commonwealth v. Robinson*, 970 A.2d 455, 457 (Pa. Super. 2009) (*en banc*).

When determining whether the on-the-record determination adequately revealed whether a defendant voluntarily and knowingly had waived his right to counsel in a PCRA proceeding, this Court has further stated:

In *Commonwealth v. Meehan*, 427 Pa. Super. 261, 628 A.2d 1151 (1993), which was specifically cited with approval in our Supreme Court's pronouncement in *Grazier*, we addressed whether the defendant had validly waived his rule-based right to counsel for purposes of a PCRA hearing. The defendant therein complained that he did not actually waive his right to counsel because the waiver colloquy was inadequate in that it did not

conform to the requirements of Pa.R.Crim.P. 121, formerly Pa.R.Crim.P. 318, waiver of counsel.

That rule indicates that if a defendant seeks to waive his right to counsel, six areas of inquiry must be explored and explained to the defendant to “ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent[.]” Pa.R.Crim.P. 121(A)(2). In *Meehan*, we noted that some of the precepts regarding waiver of counsel in the trial setting were inapplicable in the PCRA area. We did hold, however, that if a post-conviction waiver of counsel is requested by the defendant, the PCRA court must ascertain that “the defendant understands: (1) his right to be represented by counsel; (2) that if he waived this right, he will still be bound by all normal procedural rules; and (3) that many rights and potential claims may be permanently lost if not timely asserted.” *Id.* at 1157; *see also Commonwealth v. Powell*, 787 A.2d 1017, 1019 (Pa. Super. 2001). While we concluded that the colloquy conducted therein was sufficient, that case clearly indicates four of the six areas of inquiry contained in Rule 121 apply in the PCRA context.

Pa.R.Crim.P. Rule 121(A)(2) provides:

(2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:

(a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;

(b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;

(c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;

(d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;

(e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and

(f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.

Subsections (b) and (c) are not relevant in the PCRA setting; however, the remainder of concepts examined in Rule 121 clearly impact on whether a defendant understands the full import of his decision to act as his own counsel. Therefore, in accordance with *Meehan* and as required by [ *Commonwealth v.* *David*, [582 Pa. 52, 868 A.2d 431 (2005) (finding that it is up to the trial court to ensure that a proper colloquy is performed where a defendant has invoked his right to self-representation),] we conclude that if a PCRA defendant indicates a desire to represent himself, it is incumbent upon the PCRA court to elicit information from the defendant that he understands the items outlined in Pa.R.Crim.P. 121(A)(2)(a), (d), (e), and (f). A court must explain to a defendant that he has the right to counsel, in accordance with (a), that he is bound by the rules as outlined in (d), and that he may lose rights, as indicated in (f). Subsection (e) must be appropriately tailored so that a defendant is informed that “there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised [in a PCRA petition], they may be lost permanently.” *Robinson*, 970 A.2d at 458–460.

*Commonwealth v. Stossel*, 17 A.3d 1286, 1288-1290 (Pa. Super. 2011).

Herein, Appellant filed a PCRA petition *pro se* on February 16, 2010, and an amended petition on March 10, 2010. Counsel entered his appearance on September 3, 2010, though Appellant continued to file documents *pro se*. Specifically, on July 7, 2011, Appellant filed a letter

addressed to the PCRA court in which he expressed his objection to counsel's filing of an amended PCRA, and on August 8, 2011, he filed his "Defendant's Objection to PCRA Counsel's Amended PCRA Petition" wherein he stated that the "amended PCRA petition excluded all issues I intended to raise. . ." **See** Defendant's Objection to PCRA Counsel's Amended PCRA Petition at ¶2." In addition, on October 6, 2011, Appellant addressed another filing to the trial court wherein he objected to the counseled, amended PCRA, and requested that the PCRA court recuse itself.

Thus, Appellant timely invoked his right to proceed *pro se* and did so clearly and unequivocally. **See Commonwealth v. Faulk**, 21 A.3d 1196, 1201 (Pa. Super. 2011) (to invoke the right of self-representation, a defendant's request to proceed *pro se* must be made timely and not for purposes of delay and must be clear and unequivocal.)

At the **Grazier** hearing, the PCRA court failed to specifically inquire as to whether Appellant understood he had a right to have free counsel appointed throughout the PCRA process were he found to be indigent. **See Stossel, supra**. However, Appellant did testify that he was capable of observing filing deadlines, requesting records, and presenting appropriate issues in his appeal, and he acknowledged that there were some things counsel knew that he did not. N.T., 4/9/12 at 8-9. Appellant stressed that he had wanted to represent himself throughout the post conviction proceedings:

The Court: Let me just ask you now in view of all of the things that I have told you, is it still your wish to give up your right to have an attorney represent you?

[Appellant]: Yes, your Honor.

The Court: Has anyone threatened you or forced you to proceed without an attorney?

[Appellant]: No, your Honor, just the lack of communication to talk to my attorney.

The Court: So, are you saying that you would not have an objection to continuing with counsel if there were greater communication between the two of you?

[Appellant]: No, it's been 5 years, your Honor, and I have been going through the same thing for 5 years.

N.T., 4/9/12, at 9-10.

Yet, following his inquiry into the aforementioned areas in response to which Appellant expressed his understanding and a desire to proceed without counsel, the PCRA court denied his request to do so without providing a basis for its decision on the record. Instead, the following exchange ensued:

[Appellant]: Your Honor, I don't have the right to represent myself? I can't practice my constitutional right to represent myself?

The Court: No, you do not have a constitutional right to represent yourself. You have a right to have a hearing as we have had today to make a determination as to whether you should be allowed to represent yourself, and I have ruled on that, and I am denying your request to represent yourself. Mr. Wolfe will continue to represent you.

[Appellant]: Your Honor, my 1925 B statement doesn't have nearly the stuff that I have to put on there. It has one issue, when I have several issues that I could put on my 1925B.

N.T., 4/9/12 at 14-15.

Moreover, in its Opinion, the PCRA court set forth only the following, brief discussion on this issue:

On April 9, 2012, this [c]ourt conducted a hearing to determine if [Appellant's] request to proceed *pro se* on appeal is knowing, intelligent and voluntary pursuant to Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998). When asked about his reason for requesting to proceed *pro se*, [Appellant] stated that he was not happy with the lack of communication between himself and his attorney. (N.T. Grazier 4/9/12 at 9) [Appellant] also stated that he wanted to have input on the 1925(b) statement to be submitted on his behalf by PCRA counsel. (N.T. Grazier 4/9/12, 15-17) Based on the testimony heard during [Appellant's] Grazier hearing, this court denied [Appellant's] request to proceed *pro se*. The [c]ourt determined that appellant that [sic] failed to meet the three prongs of the Grazier test.

PCRA Court Opinion, 8/24/12 at 8.

First, the PCRA court erroneously stated Appellant had no constitutional right to represent himself. To the contrary,

[a] criminal defendant has a long-recognized constitutional right to dispense with counsel and to defend himself before the court. ***Faretta v. California***, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975) (implicit in the structure of the Sixth Amendment is the right of a criminally accused to conduct his own defense); ***Commonwealth v. Szuchon***, 506 Pa. 228, 250, 484 A.2d 1365, 1376-1377 (1984) (an accused has a right to conduct his own defense pursuant to Article 1, Section 9 of the Pennsylvania Constitution). In short, this highly personal constitutional right operates to prevent a state from bringing a person into its criminal courts and in those courts force a lawyer upon him when he asserts his constitutional right to conduct his own defense. ***Faretta, supra***, at 807, 95 S.Ct. at 2527. Further, the denial of a criminal defendant's right to proceed *pro se* is not subject to a harmless error analysis. ***McKaskle v. Wiggins***, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 950 n. 8, 79 L.Ed.2d 122 (1984) ("the right to self-representation is either respected or denied; its deprivation cannot be harmless").

***Commonwealth v. Starr***, 541 Pa. 564, 580-581, 664 A.2d 1326, 1334-1335 (Pa. 1995) (footnotes omitted) ***See also Commonwealth v. Faulk***, 21 A.3d 1196, 1200-1201 (Pa. Super. 2011) (stating it is well established that a criminal defendant's right to counsel under the Sixth Amendment includes the concomitant right to waive counsel's assistance and proceed to represent oneself at criminal proceedings. The right to appear *pro se* is guaranteed as long as the defendant understands the nature of his choice) (quotations and citations omitted).

Also, by characterizing Appellant's concern as involving only a "lack of communication" which it deemed would be remedied by its directive to PCRA counsel to communicate with his client and provide him with notes and information, the PCRA court failed to determine whether Appellant was capable of asserting his right to self-representation. ***Commonwealth v. Starr***, 664 A.2d 1326, 1336 (Pa. 1995) ("[A] consideration of the defendant's best interests (i.e., that the defendant would be subject to less risk of conviction and/or consequently more severe punishment if represented by competent counsel) is wholly irrelevant to an assessment of whether a criminal defendant has rendered a knowing and intelligent waiver of his right to the assistance of counsel or not."). Nowhere in the certified record has the PCRA court addressed whether Appellant knowingly,

intelligently, and voluntarily asserted his right to self-representation. Thus, the PCRA court erred in denying Appellant's request to proceed *pro se*.

Inasmuch as the PCRA court failed to hold a proper colloquy to address whether Appellant knowingly, intelligently and voluntarily asserted his right to self-representation, we must vacate its Order and remand for a proper ***Grazier*** hearing so the PCRA court can ensure Appellant understands he has a right to counsel throughout the PCRA process and to make and on-the-record finding as to whether Appellant's request to represent himself was knowing, intelligent, and voluntary under ***Grazier***.<sup>4</sup> ***See Stossel, supra; Robinson, supra***. Once the appropriate proceedings are conducted, the Order denying Appellant PCRA relief can be reinstated, and Appellant, or his counsel, may file an appeal.

Based upon our disposition of Appellant's third issue raised herein, we conclude that the merits of his remaining two issues presented in his Amended PCRA petition are not yet ripe, and, therefore, we offer no opinion with regard thereto.

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

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<sup>4</sup> The Commonwealth has acknowledged that "[t]he notes of testimony from [Appellant's] *Grazier* hearing do not explain why [Appellant's] request was not knowing, voluntary, or intelligent" and indicated that it would, thus, not be opposed to an order remanding this matter to the PCRA court for further development of its ruling in accordance with ***Grazier***. ***See*** Commonwealth's Brief at 7.