

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DAVID L. MAYES

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3158 EDA 2012

Appeal from the Judgment of Sentence October 18, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0008461-2004

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DAVID L. MAYES

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3159 EDA 2012

Appeal from the Judgment of Sentence October 18, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0007605-2009

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

MEMORANDUM BY LAZARUS, J.

FILED DECEMBER 12, 2013

David L. Mayes, represented by Sean E. Cullen, Esq., appeals from his judgment of sentence imposed by the Court of Common Pleas of Montgomery County. After reviewing appellant's brief, we direct counsel to file a proper advocate's brief or, in the alternative, file a petition to withdraw

pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). Attorney Cullen's attempt at an advocate's brief falls short, and Mayes, like all appellants, has a right to the zealous advocacy of competent counsel or the protections of formal withdrawal procedures.

In ***Anders***, the United States Supreme Court addressed the quality of representation to which an indigent criminal defendant was entitled in an appeal as of right. There, the Court concluded that equality of representation could only be assured "where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." ***Anders, supra*** at 744.

Anders offers Attorney Cullen two choices when representing a client such as Mayes. Either he can prosecute the appeal, in which case he will be expected to perform as a spirited advocate on his client's behalf, or counsel may choose to withdraw his services. ***McClendon, supra*** at 1187.

Should Attorney Cullen choose the latter, he must comply with certain mandates set forth in ***Anders*** and its Pennsylvania progeny. These mandates are not overly burdensome and have been summarized as follows:

Direct appeal counsel seeking to withdraw under ***Anders*** must file a petition averring that, after a conscientious examination of the record, counsel finds the appeal to be wholly frivolous. Counsel must also file an ***Anders*** brief setting forth issues that might arguably support the appeal along with any other issues necessary for the effective appellate presentation thereof.

Anders counsel must also provide a copy of the **Anders** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.

If counsel does not fulfill the aforesaid technical requirements of **Anders**, this Court will deny the petition to withdraw and remand the case with appropriate instructions (e.g., directing counsel either to comply with **Anders** or file an advocate's brief on Appellant's behalf).

Commonwealth v. Woods, 939 A.2d 896, 898 (Pa. Super. 2007) (citations omitted).

Moreover, the **Anders** brief that accompanies counsel's petition to withdraw 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.

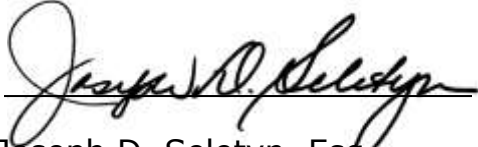
Santiago, supra at 361.

After reviewing Attorney Cullen's brief, this Court concludes that Mayes did not receive the full benefit of zealous advocacy. While serving as an advocate, a lawyer must zealously assert the client's position under the rules of the adversary system. **See** Pennsylvania Rules of Professional Conduct, Preamble & Scope. While clients may not always be cooperative, this in no way diminishes an attorney's duty of zealous advocacy.

We grant Attorney Cullen thirty days from the date of this order to file an advocate's brief or, in the alternative, an **Anders** brief and petition to

withdraw. We grant the Commonwealth thirty days from the date of filing of appellant's brief which to respond to appellant's brief. We retain panel jurisdiction.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/12/2013