

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JEFFREY MARK KENNOY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 355 EDA 2012

Appeal from the PCRA Order Entered December 16, 2011
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0006475-2007

BEFORE: BENDER, P.J., SHOGAN, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J.

FILED JANUARY 23, 2014

Appellant, Jeffrey Mark Kennoy, appeals *pro se* from the court's December 16, 2011 order denying his petition for relief filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. For the following reasons, we remand for further proceedings consistent with this memorandum decision.

Appellant pled guilty on December 30, 2009, to two counts of aggravated assault and various firearm offenses. On June 28, 2010, he was sentenced to an aggregate term of 22 to 44 years' incarceration. Appellant did not file a direct appeal; instead, he filed a *pro se* PCRA petition on May 10, 2011. Kate M. Kelly, Esq., was appointed to represent Appellant and

* Former Justice specially assigned to the Superior Court.

filed an amended petition on his behalf. After conducting a hearing on November 10, 2011, the PCRA court denied Appellant's petition by order entered on December 16, 2011.

Appellant filed a timely *pro se* notice of appeal.¹ The PCRA court directed Appellant, who was still represented by Attorney Kelly, to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). In response, Attorney Kelly filed a "Statement of Intent to File an **Anders/McClendon** Brief in Lieu of Concise Statement of Matters Complained of Pursuant to [Pa.R.A.P.] 1925(c)(4)."² She then filed *with the trial court* a petition to withdraw as counsel, as well as an **Anders** brief. The PCRA court did not rule on Attorney Kelly's petition to withdraw. Instead, it issued a Pa.R.A.P. 1925(a) opinion stating that Attorney Kelly should have filed her petition to withdraw with this Court. **See** PCRA Court Opinion, 5/15/13, at 2 (citing Pa.R.A.P. 1925(c)(4)).

Now, on appeal, Appellant has filed a *pro se* brief, while nothing has been forthcoming from Attorney Kelly. These circumstances are problematic

¹ We note that the record indicates that Appellant's notice of appeal was mailed on January 13, 2012, but was not docketed until January 18, 2012. Pursuant to the "prisoner mailbox rule," we consider Appellant's *pro se* notice of appeal as being timely filed. **See Commonwealth v. Little**, 716 A.2d 1287, 1288 (Pa. Super. 1998) (stating appeals filed by *pro se* prisoner are "deemed filed on the date that the prisoner deposits the appeal with prison authorities, or places it in a prison mailbox").

² **See Anders v. California**, 386 U.S. 738 (1967); **Commonwealth v. McClendon**, 434 A.2d 1185 (Pa. 1981).

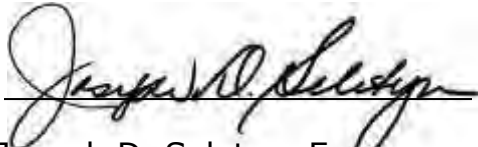
for several reasons. First, when Appellant filed a notice of appeal, the PCRA court was divested of jurisdiction to rule on Attorney Kelly's petition to withdraw. **See** Pa.R.A.P. 1701(a) (directing that, except as otherwise prescribed, after an appeal is taken, the trial court may no longer proceed further in the matter); **see also Commonwealth v. Cooper**, 27 A.3d 994, 1005 (Pa. 2011) (stating "the general rule that the filing of a notice of appeal divests the trial court of jurisdiction"). Therefore, Attorney Kelly should have filed her petition to withdraw with this Court. **See** Pa.R.A.P. 1925(c)(4). Because she did not, Attorney Kelly is still counsel of record for Appellant. Accordingly, we are unable to consider his *pro se* brief, as to do so would be to permit hybrid representation in violation of **Commonwealth v. Ellis**, 626 A.2d 1137, 1141 (Pa. 1993) (disapproving of *pro se* filings where the appellant is represented by counsel). Instead, the appropriate response to Appellant's *pro se* brief is to forward it to Attorney Kelly, and to await action by Attorney Kelly before proceeding further in this appeal. **Commonwealth v. Jette**, 23 A.3d 1032, 1044 (Pa. 2011) ("[T]he proper response to any *pro se* pleading is to refer the pleading to counsel, and to take no further action on the *pro se* pleading unless counsel forwards a motion.").

Therefore, we direct the Superior Court Prothonotary's Office to forward Appellant's *pro se* brief to Attorney Kelly. Additionally, we order Attorney Kelly to file, *with this Court*, either an advocate's brief on Appellant's behalf, or a petition to withdraw and "no-merit" letter pursuant

to **Turner/Finley**, within **thirty days** of the date this memorandum decision is filed.³

Case remanded for further proceedings. Jurisdiction retained.

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: 1/23/2014

³ We recognize that in light of Attorney Kelly's filing of a statement under Rule 1925(c)(4), we do not have a trial court opinion addressing any of Appellant's underlying issues. However, if Attorney Kelly chooses to file an advocate's brief on Appellant's behalf that necessitates a trial court opinion, we will remand for the filing of an opinion at that point.