

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

BERNARD THOMAS CRAWLEY

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 511 MDA 2012

Appeal from the PCRA Order October 3, 2011
In the Court of Common Pleas of Fulton County
Criminal Division at No(s): CP-29-CR-0000066-2005
CP-29-CR-0000068-2005
CP-29-CR-0000069-2005

BEFORE: SHOGAN, J., MUNDY, J., and OTT, J.

MEMORANDUM BY OTT, J.:

Filed: February 26, 2013

Bernard Thomas Crawley appeals from the Fulton County Court of Common Pleas' order, dated October 3, 2011,¹ dismissing, without a hearing, his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. On appeal, he claims that trial counsel was ineffective in failing to investigate and call certain alibi witnesses to testify at his trial. Based on the following, we reverse the court's order and remand.

The facts and procedural history are as follows. On January 24, 2006, Crawley was convicted, at a nonjury trial, of three counts of delivery of a controlled substance and three counts of possession of a controlled

¹ The order was time-stamped and filed on the following day.

substance.² On February 21, 2006, the trial court sentenced Crawley to an aggregate term of six years' imprisonment.³ A panel of this Court affirmed the judgment of sentence on June 18, 2007. ***See Commonwealth v. Crawley***, 931 A.2d 43 [938 MDA 2006] (Pa. Super. 2007) (unpublished memorandum).

On March 3, 2008, Crawley filed a *pro se* PCRA petition. In his petition, he stated that his counsel had filed a petition for allowance of appeal with the Pennsylvania Supreme Court but it was subsequently dismissed as being untimely filed. He also challenged the legality of his sentence. He was appointed new counsel, who filed an amended petition on April 8, 2008. On February 27, 2009, after conducting an evidentiary hearing, the court found the following:

[Crawley] made an appropriate and timely request to his appeal counsel for filing of the Petition for Allowance of Appeal and that [Crawley]'s appeal counsel failed to perfect the appeal in a timely manner and, therefore, deprived [him] of his right to appeal. Commonwealth v. Bath, 907 A.2d 619 (Pa. Super. 2006) and Commonwealth v. Gadsen, 832 A.2d 1082 (Pa. Super. 2003).

THE COURT HEREBY concludes that [Crawley]'s appeal counsel was ineffective and [Crawley]'s right to petition the Pennsylvania Supreme Court for Allowance of Appeal is hereby reinstated

² 35 P.S. § 780-113(a)(30) and (a)(16), respectively.

³ The court determined the possession convictions merged with the delivery convictions for sentencing purposes. It imposed a term of 24 to 48 months' incarceration for each delivery count, to be served consecutively.

effective as of the date newly appointed appeal counsel is in receipt of this Order.

Order of the Court, 2/27/2009, at 2. Crawley subsequently filed a petition for allowance of appeal, which the Supreme Court denied on October 29, 2009. ***See Commonwealth v. Crawley***, 982 A.2d 1222, 1223 (Pa. 2009) (*per curiam*).

On September 17, 2010, Crawley filed another *pro se* PCRA petition. New counsel was appointed, who filed an amended petition on June 13, 2011. In the amended petition, Crawley asserted that trial counsel was ineffective for (1) failing to investigate alibi witnesses, provided to him by Crawley, who were likely to offer testimony as to Crawley's whereabouts during the commission of the crime and, in the alternative, (2) failing to pursue a plea agreement.

The PCRA court entered a Pennsylvania Rule of Criminal Procedure 907 notice of intent to dismiss without a hearing on August 24, 2011. The court stated that both issues were waived, pursuant to 42 Pa.C.S. § 9543(3), because the matter was not raised on direct appeal or in Crawley's first amended PCRA petition "even though the issue was ripe for review at those times." Order of Court and Notice of Intention to Dismiss Without a Hearing Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), 8/24/2011, at 2.

Counsel did not file a response to the Rule 907 notice but Crawley did file several *pro se* letters with the court. After stating that counsel had not

responded to the Rule 907 notice and finding that Crawley's *pro se* letters did not address the reasons for the PCRA court's intention to dismiss, the court determined there were no material issues of fact that would require a hearing and it dismissed the PCRA petition on October 3, 2011. This appeal followed.⁴

On March 9, 2012, the PCRA court ordered Crawley to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Crawley filed a concise statement on March 22, 2012. The PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a) on May 29, 2012. In the opinion, the court stated the following, in pertinent part:

Upon review of the record in preparation for this Rule 1925(a) opinion, we recognized that the first petition was a request for reinstatement of appeal rights, specifically, to seek allowance of appeal to the Supreme Court for direct review of this case. Further, pursuant to Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002) and its progeny, a petitioner is not required to bring a claim of ineffective assistance of counsel until after direct review has concluded. Therefore, the instant petition for relief is the first time the merits of these issues could be raised. We now note our error in dismissing these two claims on the grounds that they were waived pursuant to 42 Pa. Con. Stat. § 9544(b) for not having been previously raised.

⁴ On February 3, 2012, counsel for Crawley filed a petition for allowance of appeal *nunc pro tunc* with the PCRA court. In the petition, counsel noted that he did not receive Crawley's October 29, 2011 letter asking for counsel to file an appeal until six days after it had been mailed, and by this time, the deadline to file an appeal had already passed. He stated he filed a petition with this Court, which directed him to seek relief with the PCRA court. On February 21, 2011, the PCRA court granted Crawley leave to file an appeal of the October 3, 2011 order *nunc pro tunc* with this Court.

. . . .

We ask that our Order of October 3, 2011 be affirmed in part, and vacated and remanded in part. . . . Further, our denial of the claim [for relief] regarding failure to investigate alibi witnesses should be vacated and remanded so that we may conduct an evidentiary hearing and address the merits of this claim.

PCRA Court Opinion, 5/29/2012, at 1-2.

Before we may analyze Crawley's substantive claim, we must address the PCRA court's request to reverse and remand its order.

"It is now well[-]established that a PCRA petition brought after an appeal *nunc pro tunc* is considered [an] appellant's first PCRA petition, and the one-year time clock will not begin to run until this appeal *nunc pro tunc* renders his judgment of sentence final." ***Commonwealth v. O'Bidos***, 2004 PA Super 131, 849 A.2d 243, 252 n.3 (Pa.Super. 2004) (citing ***Commonwealth v. Karanicolas***, 2003 PA Super 422, 836 A.2d 940 (Pa.Super. 2003); ***Commonwealth v. Lewis***, 718 A.2d 1262 (Pa.Super. 1998)).

Commonwealth v. Fowler, 930 A.2d 586, 591 (Pa. Super. 2007). Moreover, claims of trial counsel's ineffectiveness are generally deferred until PCRA review unless the trial court conducts an evidentiary hearing, the defendant expressly waives his right to PCRA review, and the court addresses the issues in its Rule 1925(a) opinion. ***See Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011) (*en banc*); ***Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003); ***Commonwealth v. Wright***, 961 A.2d 119, 148 n.22 (Pa. 2008); ***Commonwealth v. Liston***, 977 A.2d 1089 (Pa. 2009).

Here, because the prior petition had resulted in the reinstatement of Crawley's right to pursue a petition for allowance of appeal, the present petition is deemed to be Crawley's first PCRA petition. *Fowler, supra*. For this reason, Crawley did not waive his right to raise his ineffective assistance of counsel claim with regard to alibi witnesses, as this was the first time that he could raise this claim. Therefore, we agree with the PCRA court that it committed legal error in dismissing the present petition and grant its request to reverse the order so that it may conduct an evidentiary hearing to address the merits of Crawley's claim.⁵ Accordingly, we reverse the order and remand the matter for further proceedings.

Order reversed. Case remanded. Jurisdiction relinquished.

⁵ Based on our disposition, we need not address Crawley's substantive claim.