

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

DAMON L. ENNETT

Appellant

No. 699 MDA 2012

Appeal from the Order February 22, 2011  
In the Court of Common Pleas of Schuylkill County  
Criminal Division at No(s): CP-54-CR-0000943-2010

BEFORE: MUNDY, J., OTT, J., and STRASSBURGER, J.\*

MEMORANDUM BY OTT, J.:

Filed: January 2, 2013

Damon L. Ennett appeals *pro se* from the February 22, 2012 order of the Court of Common Pleas of Schuylkill County that denied his *pro se* motion to modify sentence *nunc pro tunc*. Based upon the following, we vacate the order and remand.

The background of this case was ably summarized by the trial judge:

On November 28, 2011, Ennett entered a plea of *nolo contendere* to murder in the third degree (Count 1), burglary (Count 4) and aggravated assault with a deadly weapon (Count 4). Ennett was sentenced that day pursuant to the terms of a plea agreement, *inter alia*, to serve 13-1/2 years to 27 years in a state correctional institution on the homicide charge and a concurrent three to six years term of incarceration on the burglary offense. No sentence was imposed on the aggravated

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\* Retired Senior Judge assigned to the Superior Court.

assault offense, which was found to merge with the homicide for sentencing purposes.

The Commonwealth had filed a twelve-count information against Ennett on July 12, 2010. Ennett, together with Julius Enoe and Jahmal Ollivirre, were charged relative to the March 16, 2010 shooting death of Bruce Forker in Shenandoah, Schuylkill County. The Commonwealth contended that the three men conspired to enter Forker's home at night and rob him of money and drugs. During the commission of the robbery, Enoe shot Forker in the head, killing him in an upstairs bedroom while Forker's girlfriend and young child stood a few feet away and his baby slept in the next room. Ennett cooperated with the Commonwealth in its attempt to secure a first degree murder conviction of Enoe and, in return, was offered a plea deal whereby Ennett would avoid the possibility of a second degree murder conviction and life sentence.

A question had been raised at sentencing about the precise time-served credit to which Ennett was entitled and he thereafter filed a December 6, 2011 motion for modification referable to credit, to which the Commonwealth was unopposed. This court granted the motion and modified Ennett's November 28, 2011 sentence, to the extent that the requested credit was awarded. The order granting the sentence modification was entered December 8, 2011.

On February 16, 2012, the [trial] court received, via mail, a *pro se* motion to modify sentence nunc pro tunc. In accordance with applicable Pennsylvania Rules of Criminal Procedure, the document was forwarded to the Schuylkill County Clerk of Courts Office for filing and processing. Thereafter, the motion was docketed and relayed by Court Administration for action by the court. Prior to the filing of this motion, Ennett had been represented by Schuylkill County Chief Public Defender Michael Stine.

Per the filing, Ennett claimed that he desired to file a motion to modify sentence nunc pro tunc because he had been "in transportation" and had no means to access a law library. In his Pa.R.A.P. 1925 statement, Ennett contends that his plea of nolo contendere was based on his being misguided by his attorney and that "the court made it personal" because his co-defendant [Enoe] had been acquitted.

Trial Court Opinion, 6/12/2012, at 1–3.

The trial court, in denying Ennett’s *pro se* motion to modify sentence *nunc pro tunc*, stated that Ennett “fail[ed] to indicate the efforts he made to timely seek a modification of the November 28, 2011 sentence, imposed pursuant to a plea agreement he had entered with the Commonwealth, or the grounds which exist to consider or grant modification.” **See** Order, 2/22/2012. The trial court, in its opinion, further stated: “The time for filing both a modification motion and a direct appeal had expired as of Ennett’s *nunc pro tunc* request.” Trial Court Opinion, **supra** at 4. This *pro se* appeal followed.

Our review of the record and the controlling law leads us to conclude that Ennett’s request for post-sentence relief should have been treated by the court as a petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546.

As we noted in **Commonwealth v. Fowler**, 930 A.2d 586, 591 (Pa. Super. 2007), *appeal denied*, 944 A.2d 756 (Pa. 2008), since “the PCRA provides the sole means for obtaining collateral review,” it follows “that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition.” **Id.** (citation omitted). **See, e.g., Commonwealth v. Evans**, 866 A.2d 442, 443–444 (Pa. Super. 2005) (motion for reconsideration or modification of sentence was to be examined under PCRA); **Commonwealth v. Kutnyak**, 781 A.2d 1259, 1261 (Pa. Super. 2001) (defendant’s *pro se* motion challenging guilty plea should be

considered PCRA petition “regardless of the manner in which the petition is titled”).

Furthermore, under our precedent, an indigent defendant is entitled to the assistance of counsel for a first PCRA petition. ***See Evans, supra***, at 443–444 (“[A]n indigent petitioner seeking relief under the PCRA is entitled to the mandatory appointment of counsel. While this entitlement may be waived, petitioner may do so only after addressing his entitlement to appointed counsel with the PCRA court.”).

Accordingly, we vacate the order of the trial court and remand for further proceedings consistent with this memorandum.

Order vacated. Case remanded. Jurisdiction relinquished.