NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. LONNIE SPELLMAN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 883 EDA 2012

Appeal from the PCRA Order February 27, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010295-2009

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.: **FILED DECEMBER 04, 2013**

Appellant, Lonnie Spellman, appeals from the February 27, 2012 order dismissing his first petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

We summarize the relevant facts and procedural history of this case as follows. On January 6, 2010, Appellant proceeded to a bench trial, at the conclusion of which, the trial court found him guilty of one count each of persons not to possess, use, manufacture, control, sell or transfer firearms, firearms not to be carried without a license, and carrying firearms in public

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* Former Justice specially assigned to the Superior Court.

in Philadelphia.[1] On February 18, 2010, the trial court imposed an aggregate sentence of five to ten years' imprisonment.[2] Appellant did not file a direct appeal with this Court.

On May 10, 2010, Appellant filed a timely PCRA petition. The PCRA court appointed counsel who filed an amended PCRA petition on January 5, 2011. The Commonwealth filed a motion to dismiss on March 4, 2011. Appellant filed a supplemental PCRA petition on October 7, 2011. The Commonwealth filed a second amended motion to dismiss on January 27, 2012. The PCRA court conducted a hearing on February 27, 2012. That same day, the PCRA court entered an order dismissing Appellant's PCRA petition. On March 9, 2012, Appellant filed a *pro se* notice of appeal.[3] PCRA

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[1] 18 Pa.C.S.A. §§ 6105(a)(1), 6106(a)(1), and 6108, respectively.

[2] The trial court imposed a sentence of five to ten years' imprisonment for persons not a possess a firearm and a concurrent sentence of three to six years' imprisonment for firearms not to be carried without a license. The trial court imposed no further penalty for carrying firearms in public in Philadelphia.

[3] On March 9, 2012, contemporaneous with his *pro se* notice of appeal, Appellant filed a request with the PCRA court to proceed *pro se*. The record indicates that the PCRA court took no action on this petition. In ***Commonwealth v. Robinson***, 970 A.2d 455 (Pa. Super. 2009) (*en banc*), this Court held that "in any case where a defendant seeks self-representation in a PCRA proceeding and where counsel has not properly withdrawn, a [hearing pursuant to ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998)] must be held." ***Id.*** at 456. More specifically, "a colloquy [under Pa.R.Crim.P. 121(A)] must be held by the PCRA court of its own accord … once the defendant has expressed a desire to proceed *pro se* as long as PCRA counsel has not properly withdrawn by complying with the
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counsel filed a timely counseled notice of appeal on March 16, 2012.[4] On July 16, 2012, the PCRA court entered an order directing Appellant to file and serve a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On August 6, 2012, Appellant filed a *pro se* Rule 1925(b) statement and on February 27, 2013, current PCRA counsel filed a counseled Rule 1925(b) statement.[5] The PCRA court issued its Rule 1925(a) opinion on March 28, 2013.

On appeal, Appellant raises seven issues for our review.

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dictates of ***Turner*/*Finley***." ***Id.*** at 460. Although the PCRA court did not take any action on this petition as required, in careful consideration of the fact that Appellant is currently represented by privately retained counsel on appeal, we do not find this procedural defect fatal to our appellate review. In reaching this decision, we note that we may raise the issue of a ***Grazier*** hearing and Rule 121 colloquy *sua sponte*. ***Commonwealth v. Stossel***, 17 A.3d 1286, 1290 (Pa. Super. 2011).

[4] On April 16, 2012, this Court entered an order *sua sponte* dismissing Appellant's *pro se* appeal as duplicative of the counseled appeal. ***See*** Superior Court Order, 840 EDA 2012, 4/16/12, at 1.

[5] We note that Appellant's *pro se* Rule 1925(b) statement was a nullity as he was still represented by counsel at that time. ***Commonwealth v. Ali***, 10 A.3d 282, 293 (Pa. 2010) (citation omitted). Even if it were not a nullity, it was not file stamped with the PCRA court, but rather it is stamped as received by the PCRA judge, and our Supreme Court has held this is not sufficient to comply with Rule 1925(b). ***See Commonwealth v. Butler***, 812 A.2d 631, 634 (Pa. 2002) (stating, "Rule 1925 is not satisfied when an appellant merely mails his Rule 1925(b) statement to the presiding judge[]"). We further observe that although Appellant's counseled Rule 1925(b) statement is file-stamped and contained within the record, it was not entered onto the trial court's docket. However, "[a]lthough the trial court docket is part of the official record, when it is at variance with the certified record it references, the certified record controls." ***Shelly Enters., Inc. v. Guadagnini***, 20 A.3d 491, 494 (Pa. Super. 2011).

A. Whether [t]he [PCRA] court erred in denying the [PCRA p]etition where [t]rial [c]ounsel [f]ailed to [i]nterview and [s]ubpeona [w]itnesses [i]n [] Appellant's [d]efense?

B. Whether [t]he [PCRA] court erred in denying the [PCRA p]etition where the Commonwealth failed to establish the elements of the crime of a person not to possess a firearm and illegally possessing a firearm on the streets of Philadelphia [] at trial?

C. Whether [t]he [PCRA] court erred in denying the [PCRA p]etition where [trial] counsel was ineffective for failing to file a motion to suppress evidence prior to trial?

D. Whether [t]he [PCRA] court erred in denying the [PCRA p]etition where the trial court erred in the [sic] in considering incorrect information and applying incorrect guidelines which resulted in an excessive sentence?

E. Whether [t]he [PCRA] court erred in denying the [PCRA p]etition where the trial court denied [Appellant]'s Petition to Strike Void the Judgment?

F. Whether [t]he [PCRA] court erred in denying the [PCRA p]etition where trial counsel was ineffective for failing to file post sentence motions challenging the weight of the evidence or a timely notice of appeal[?]

G. Whether [t]he [PCRA] court erred in denying the [PCRA p]etition where trial counsel was ineffective and where the [trial] court was biased in favor of the [Commonwealth] and asked questions which indicated such bias[?]

Appellant's Brief at 5.

We begin by noting our well-settled standard of review. "On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). "However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

Likewise, "[i]t is well-established that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." ***Koehler***, ***supra***, *citing* ***Strickland v. Washington***, 466 U.S. 668, 687-691 (1984). Our Supreme Court has articulated a three-prong test to determine when an appellant has received ineffective assistance of counsel. "Appellant must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission." ***Id.***, *citing* ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). Appellant must

show that his claim meets all three prongs of the ***Pierce*** framework in order to be entitled to relief. ***Commonwealth v. Thomas***, 44 A.3d 12, 17 (Pa. 2012) (citation omitted).

Prior to addressing the merits of Appellant's claims, we must first determine whether Appellant has complied with Pennsylvania Rule of Appellate Procedure 1925(b) to preserve these claims for our review. Rule 1925(b) by its text requires that statements "identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa.R.A.P. 1925(b)(4)(ii). The Rule also requires that "[e]ach error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court …." ***Id.*** at 1925(b)(4)(v). Finally, any issues not raised in accordance with Rule 1925(b)(4) will be deemed waived. ***Id.*** at 1925(b)(4)(vii). Our Supreme Court has held that Rule 1925(b) is a bright-line rule.

> Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms; the Rule's provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule's requirements; Rule 1925 violations may be raised by the appellate court *sua sponte,* and the Rule applies notwithstanding an appellee's request not to enforce it; and, if Rule 1925 is not clear as to what is required of an appellant, on-the-record actions taken by the

> appellant aimed at compliance may satisfy the Rule. We yet again repeat the principle first stated in [***Commonwealth v.***] ***Lord***, [719 A.2d 306 (Pa. 1998)] that must be applied here: "[I]n order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925. Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived." [***Id.***] at 309.

Commonwealth v. Hill, 16 A.3d 484, 494 (Pa. 2011) (footnote omitted).

In the case *sub judice*, the PCRA court directed Appellant to file a Rule 1925(b) statement on July 16, 2012. The order directed Appellant to file said statement within 21 days of said order, which was August 6, 2012. However, Appellant's counseled Rule 1925(b) statement was not filed until February 27, 2013, 205 days after the filing period had expired. As a result, following our Supreme Court's directive in ***Hill***, we are required to deem all of Appellant's issues waived.[6] ***See Hill***, ***supra***.

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[6] We note that Rule 1925(c)(3) states "[i]f an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been *per se* ineffective, the appellate court shall remand for the filing of a Statement *nunc pro tunc* and for the preparation and filing of an opinion by the judge." Pa.R.A.P. 1925(c)(3) (italics added). This Court has held that on direct appeal, a failure to timely file a Rule 1925(b) statement is the equivalent of a failure to file said statement. ***Commonwealth v. Thompson***, 39 A.3d 335, 340 (Pa. Super. 2012), *citing* ***Commonwealth v. Burton***, 973 A.2d 428, 433 (Pa. Super. 2009) (*en banc*). Both failures constitute *per se* ineffective assistance of counsel, which in criminal cases ordinarily requires a remand for the filing of a Rule 1925(b) statement pursuant to Pa.R.A.P. 1925(c)(3). However, in ***Hill*** our Supreme Court stated that this procedure is not available in a PCRA appeal. ***See Hill***, ***supra*** at 495 n.14 (stating that Rule 1925(c)(3) "speaks

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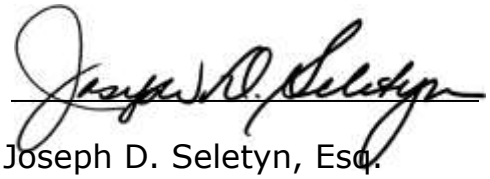
Based on the foregoing, we conclude that Appellant has waived all of his issues on appeal for failure to timely file his Rule 1925(b) statement.[7] Accordingly, the PCRA court's February 27, 2012 order is affirmed.[8]

Order affirmed. Motion dismissed.

Justice Fitzgerald Concurs in the Result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013

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of remand only in 'criminal cases[,]' … [and t]echnically, the PCRA is civil in nature[]"). Our Supreme Court further noted that "there is, as yet, no decisional law holding that Rule 1925 defaults by counsel at the PCRA appeal stage are available, and remediable, via a serial PCRA petition." ***Id.*** at 497.

[7] Although the PCRA court dismissed Appellant's PCRA petition on the merits, we may affirm the PCRA court on any basis supported by the record. ***Commonwealth v. Wiley***, 966 A.2d 1153, 1157 (Pa. Super. 2009) (citation omitted).

[8] On October 30, 2013, Appellant filed a *pro se* "Motion to Rule on the Above-captioned Appeal." As Appellant is currently represented by counsel, we dismiss said motion as hybrid representation on appeal is not permitted, rendering said motion a nullity. ***See Commonwealth v. Cooper***, 27 A.3d 994, 1000 n.9 (Pa. 2011) (stating, "the disapproval of hybrid representation is effective at all levels []") (citation omitted).