NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JASON JOSEPH CIENIAWA,	:	
	:	
Appellant	:	No. 910 MDA 2012

Appeal from the Order entered April 11, 2012, in the Court of Common Pleas of Luzerne County, Criminal Division, at Nos. CP-40-CR-0002248-2008, CP-40-CR-0002256-2008.

BEFORE: MUNDY, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED AUGUST 16, 2013**

Jason Joseph Cieniawa (Appellant) appeals from the April 11, 2012 order which granted him relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Appellant's counsel has filed a petition for leave to withdraw as counsel and a no-merit brief pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). In response, Appellant has filed a *pro se* brief in which he requests that new counsel be appointed. We deny counsel's petition to withdraw; deny Appellant's request for new counsel; and affirm in part and vacate in part the PCRA court's order.

We summarize the complicated history of this case as follows. On January 20, 2009, Appellant entered negotiated pleas to receiving stolen

*Retired Senior Judge assigned to the Superior Court.

property at docket number[1] 2248 and to burglary at number 2256,[2] as well as to other charges filed at ten other docket numbers not relevant to this appeal. Appellant received an aggregate sentence of 30 to 60 months of imprisonment. The lead sentence in the whole scheme was the sentence of 12 to 24 months for receiving stolen property at 2248; all other sentences were concurrent or consecutive to it,[3] including the burglary sentence of 12 to 24 months at docket number 2256. Appellant filed no direct appeal; thus, his judgment of sentence became final on February 19, 2009.

The court docket reflects that Appellant filed a timely *pro se* PCRA petition on November 17, 2009, but the file does not contain the document and it appears no action on the petition was taken by the court. Appellant filed another *pro se* PCRA petition on May 11, 2010, and counsel was

[1] Ten of the twelve cases have 2008 docket numbers, while the other two are from 2009. For the ease of reading, all references to four-digit docket numbers are to 2008 cases unless it is indicated otherwise.

[2] In some places in the record and transcripts, including the 2009 sentencing order, the 2256 case is incorrectly recorded as being at docket number 2556.

[3] Specifically, Appellant received seven other sentences of either 6 to 12 or 12 to 24 months, each of which ran concurrent to the sentence at 2248. Appellant received a 12 to 24 month sentence at 2250, consecutive to his sentence at 2248; and at 2254, a sentence of 6 to 12 months consecutive to the sentence at 2250, which results in the 30-to-60-month aggregate sentence. Finally, Appellant's sentence of 12 to 24 months for theft by unlawful taking at docket number 2252 is not directly linked to the sentence at 2248; however, it runs concurrent with the sentence at 2250, which is consecutive to 2248.

appointed. Despite having counsel, Appellant proceeded to file a number of *pro se* motions, one of which was considered by the Commonwealth Court. The PCRA court rescheduled a previously-scheduled PCRA hearing for April 11, 2012. At the hearing, the PCRA court allowed Appellant to amend his petition orally. Appellant presented claims that he was not given the proper amount of credit for time served and that his sentence for receiving stolen property at 2248 merged with his burglary sentence at 2256, as the stolen vehicle he possessed on March 22, 2008 was obtained in the March 21, 2008 burglary.

The PCRA court agreed with Appellant as to both issues. It therefore entered an order on April 11, 2012 which (1) granted Appellant 51 days of credit time instead of the 25 days initially ordered; (2) provided that the sentence at 2248 merged into the sentence at 2256; and (3) imposed a new sentence at 2256 of 12 to 24 months, "consecutive to the others." N.T., 4/11/2012, at 44.

Appellant's counsel filed a timely notice of appeal on May 10, 2012.[4] Counsel filed with this Court a petition to withdraw as counsel and a "No Merit/***Turner-Finley*** Brief." Appellant, in his only appropriate and allowable *pro se* filing, filed a response raising additional issues, including the

[4] The docket also reflects that Appellant, as he is wont to do, filed numerous motions, notices, and letters on his own behalf both before and after the counseled notice of appeal. We remind him again, as we and the PCRA court have done previously: **hybrid representation is not permitted**. ***See, e.g., Commonwealth v. Ellis***, 626 A.2d 1137 (Pa. 1993).

allegation that he had already served the entirety of his sentence at 2256, rendering his new sentence for the same crime illegal.

By order of February 1, 2013, this Court remanded the case to the PCRA court for a factual determination whether Appellant was serving sentences for case number 2248 or 2256 at the time the PCRA court granted Appellant's petition for relief, and whether he was still serving sentences at either docket. Accordingly, the PCRA court held a hearing on February 8, 2013 at which Melody Henderson, supervisor of records at SCI Greensburg, testified. Ms. Henderson had nothing in her file to reflect the PCRA court's April 11, 2012 sentence and award of credit time; her testimony was based upon the original 2009 sentencing order. N.T., 2/8/2013, at 11. Regarding case 2256, Ms. Henderson testified that the sentence expired or maxed out on December 26, 2010. ***Id.*** According to Ms. Henderson, in April 2012, Appellant was serving an aggregation of "2248 and 2252 which did max out on December 26th of 2012." ***Id.*** at 10. Appellant was at the time of her testimony "serving 2248, 2250, and 2254 of an aggregation that currently has a max date of December 26, 2013." ***Id.*** Appellant, and then his counsel, inquired how he could be resentenced on a case for which he completely served his maximum sentence. ***Id.*** at 12, 13. The PCRA court declined to address any issue beyond what this Court ordered. ***Id.*** at 14.

On February 15, 2013, the PCRA court filed an order containing its factual findings. The PCRA court found that on April 11, 2012, Appellant

"was serving the original sentence imposed by Judge Michael Toole on January 20, 2009, that is, an aggregate of thirty (30) to (60) months." Order, 2/15/2013, at 1. Regarding Appellant's current status, the PCRA court found that Appellant was "serving an aggregate sentence identical to the sentencing scheme imposed by Judge Toole with regard to Cases 2248, 2250 and 2254 of 2008. The aggregate sentence is thirty (30) to sixty (60) months." ***Id.*** at 1-2. The PCRA court also noted that Appellant's claim that his resentencing was illegal was not raised before it prior to the appeal, and that it "fail[s] to understand" the allegation of illegality. ***Id.*** at 2.

On March 5, 2013, the court transmitted the supplemental record to this Court. The remainder of the certified record made its way back to us in early May 2013.[5] We are now finally able to consider the issues presented by this appeal.

Our first task is to address counsel's petition to withdraw. The requirements counsel faces in seeking to withdraw from representing a PCRA petitioner are governed by ***Turner***, ***supra*** and ***Finley***, ***supra***, as follows.

> …***Turner/Finley*** counsel must review the case zealously. ***Turner/Finley*** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

[5] In the meantime, Appellant filed additional *pro se* applications for relief with this Court, which we denied by order filed May 10, 2013.

> Counsel must also send to the petitioner: (1) a copy of the "no-merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.
>
> If counsel fails to satisfy the foregoing technical prerequisites of ***Turner*/*Finley***, the court will not reach the merits of the underlying claims but, rather, will merely deny counsel's request to withdraw. Upon doing so, the court will then take appropriate steps, such as directing counsel to file a proper ***Turner*/*Finley*** request or an advocate's brief.
>
> However, where counsel submits a petition and no-merit letter that do satisfy the technical demands of ***Turner*/*Finley***, the court - trial court or this Court - must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief. By contrast, if the claims appear to have merit, the court will deny counsel's request and grant relief, or at least instruct counsel to file an advocate's brief.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa. Super. 2007).

In his petition and brief, counsel indicates that he reviewed the record, case law, and all relevant statutes, and provides citations to the record and authority. Counsel's asserts the issues Appellant wishes to raise on appeal are the same two issues he argued, and won, in the PCRA court, rendering the appeal frivolous. Counsel sent Appellant the brief and petition to withdraw, and advised Appellant that he may retain other counsel or proceed *pro se*. Therefore, we conclude that counsel's filings satisfy the technical requirements of ***Turner*** and ***Finley***, and we will proceed to our independent review of the merits of the issues.

In an appeal concerning PCRA relief,

> our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review.

Commonwealth v. Nero, 58 A.3d 802, 805 (Pa. Super. 2012) (quotations and citations omitted).

We begin with the basic question of whether Appellant was qualified for relief under the PCRA. The relevant statute provides as follows.

> **(a) General rule.**--To be eligible for relief under [the PCRA], the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> > (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
> >
> > > (i) currently serving a sentence of imprisonment, probation or parole for the crime;
> > >
> > > (ii) awaiting execution of a sentence of death for the crime; or
> > >
> > > (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

42 Pa.C.S. § 9543(a).

"As soon as his sentence is completed, the petitioner becomes ineligible for relief, regardless of whether he was serving his sentence when he filed the petition." ***Commonwealth v. Hart***, 911 A.2d 939, 942 (Pa.

Super. 2006). "[T]he PCRA precludes relief for those petitioners whose sentences have expired, regardless of the collateral consequences of their sentence." ***Id.*** "Since the doctrine of collateral consequences was abrogated, we may consider no harm to appellants other than incarceration because any consequences of the challenged conviction other than incarceration are, by definition, 'collateral.'" ***Commonwealth v. Ahlborn*** (***Ahlborn I***), 683 A.2d 632, 639 (Pa. Super. 1996) (*en banc*), *affirmed* ***Commonwealth v. Ahlborn*** (***Ahlborn II***), 699 A.2d 718 (Pa. 1997).[6]

This Court addressed this issue in a case involving multiple, interconnected sentences in ***Commonwealth v. Matin***, 832 A.2d 1141 (Pa. Super. 2003). In that case, Matin had pled guilty to a number of crimes and received an aggregate sentence of 6 to 20 years with all sentences running concurrently. Matin filed a PCRA petition which the PCRA court denied. Matin appealed to this Court, and we reversed and remanded for the PCRA court to consider an issue related to Matin's firearms conviction, for which he had received a 2.5 to 5 year sentence. By the time the case returned to the PCRA court, Matin's sentence for the firearms conviction had expired. The PCRA court dismissed the petition, finding that Matin was no longer entitled

[6] Obviously, under 42 Pa.C.S. § 9543(a) incarceration is not the only harm which may be addressed; a petitioner may obtain relief when currently subject to any form of state supervision for the crime at issue, including sentences of probation and parole. This was not at issue in ***Ahlborn*** because, prior to the PCRA courts' determinations, one of the appellants had been unconditionally released from prison and the other's parole had expired.

to relief on any issue regarding the firearms conviction. This Court affirmed, based upon the following analysis.

> A petitioner is ineligible for relief under the PCRA once the sentence for the challenged conviction is completed. [***Ahlborn II, supra***]. [Matin] was sentenced on January 28, 1995 to a term of imprisonment of 2 1/2 to 5 years for the firearms violation. [Matin] has, thus, completed serving the sentence on the crime for which he seeks relief. [Matin] cannot now obtain relief on the firearms conviction.

Matin, 832 A.2d at 1143.

In the instant case, because Appellant alleged that he was no longer serving a sentence for 2248 or 2256, rendering the imposition of a new sentence at 2256 illegal, we instructed the PCRA court to determine both the accuracy of Appellant's allegation and whether he had been serving a sentence at either docket number at the time the PCRA court granted his petition. The PCRA court made the unhelpful finding that Appellant had been serving the aggregate sentence imposed for all 12 crimes collectively.

We do not question that Appellant was serving a sentence for **a** crime at the time he filed his PCRA petition, at the time PCRA relief was granted, and as we consider this appeal. But in order for a petitioner to be eligible for relief as to any given conviction, he or she must be currently serving, or waiting to serve, the sentence for **the** crime upon which the challenged conviction is based. Thus, in order for Appellant to have been entitled to relief from the PCRA court as to his receiving stolen property conviction in case 2248, he must have been currently serving the 12-to-24-month

sentence imposed for that crime at the time the issue was presented to the PCRA court. A careful examination of the testimony of Ms. Henderson reveals that he was not.

According to Ms. Henderson, in April 2012, Appellant was serving an aggregation of "2248 and 2252 which did max out on December 26th of 2012." N.T., 2/8/2013, at 10. However, the 2009 sentencing order provides that Appellant's one-to-two-year sentence at 2252 ran consecutive to his one-to-two-year sentence at 2248. Therefore, the two sentences could not possibly have maxed out on the same date; 2248, the lead charge, maxed out two years before the consecutively-imposed 2252 did.

Regarding case 2256, Ms. Henderson testified that the sentence expired or maxed out on December 26, 2010. ***Id.*** at 11. Appellant's one-to-two-year sentence at 2256 ran concurrently with his one-to-two-year sentence at 2248. Accordingly, the identical sentences should have maxed out on the same date.

Considering Ms. Henderson's testimony in light of the 2009 sentencing order, it is clear that Appellant's sentence at 2248 for receiving stolen property maxed out, at the latest, on December 26, 2010. Appellant was not currently serving or waiting to serve a sentence at 2248 at the time of Appellant's PCRA hearing on April 11, 2012. Therefore, Appellant was not eligible for PCRA relief on the receiving stolen property conviction. The PCRA

court erred as a matter of law in granting it to him.[7] Accordingly, we vacate that portion of the PCRA court's April 11, 2012 order that resentenced Appellant based upon the merger of 2248 and 2256 for sentencing purposes.[8] Because we grant this relief based upon an issue raised in Appellant's *pro se* response to his counsel's ***Turner***/***Finley*** brief, we deny counsel's petition to withdraw. ***See Wrecks, supra***.

We now consider the portion of the PCRA court's order that granted Appellant additional credit time. Because Appellant was and still is serving

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[7] Furthermore, even if Appellant had been eligible for relief, the PCRA court's April 11, 2012 sentence would have been illegal. Imposing a new sentence at 2256, consecutive to his other sentences, would have required the award of credit for the time Appellant had served prior to the resentencing. ***See*** 42 Pa.C.S. § 9760(3) ("If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining sentences shall be given for all time served in relation to the sentence set aside since the commission of the offenses on which the sentences were based."). The PCRA court's order granted Appellant only 51 days of credit time when he had served more than two years.

[8] Appellant argues in his *pro se* brief that plea counsel was ineffective in allowing him to plead guilty to both burglary and receiving stolen property because one cannot be guilty of both burglary and receiving stolen goods. ***See*** Appellant's *Pro Se* Brief at 6 (citing ***Commonwealth v. King***, 357 A.2d 556 (Pa. Super. 1976)). Therefore, Appellant contends, it is not that his sentence at 2248 should have merged with his sentence at 2256, but that his conviction at 2248 should have been vacated. We would find no merit in this argument even if the issue were not moot based upon the fact that Appellant is no longer eligible for PCRA relief. ***See Commonwealth v. Shaffer***, 420 A.2d 722 (Pa. Super. 1980) (reexamining ***King*** in light of ***Commonwealth v. Adams***, 388 A.2d 1046 (Pa. 1978)); ***Commonwealth v. Tessel***, 500 A.2d 144 (Pa. Super. 1985) (holding one can be both the thief and receiver of the same item, but cannot be sentenced for both).

part of the aggregate sentence for which he was entitled to additional credit for time served,[9] he was eligible for the relief that the PCRA court granted him in that regard. Thus, the additional 26 days of credit time awarded by the PCRA court shall be applied to his sentence at 2254, which is set to max out on December 26, 2013. Appellant's sentence now will max out on November 30, 2013.

Counsel's petition to withdraw is denied. Appellant's request for new counsel is denied. Order affirmed in part and vacated in part. Jurisdiction relinquished.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 8/16/2013

[9] Appellant was at the time of Ms. Henderson's testimony "serving 2248, 2250, and 2254 of an aggregation that currently has a max date of December 26, 2013." N.T., 2/8/2013, at 10. As the sentence at 2254 was 6 to 12 months, consecutive to the sentence at 2250, and Ms. Henderson testified that the sentence at 2250 maxed out on December 26, 2012, clearly Appellant is presently serving the sentence at 2254.