[J-170-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 16 MAP 2001
Appellant	:	
	:	Appeal from the Order of the Superior Court entered on 5/22/00 at No. 1451 HBG 1998 which affirmed the judgment of sentence of the Court of Common Pleas of Lancaster County, Criminal Division, entered on 9/4/98 at No. 1344 of 1996
v.	:	
RICARDO HERNANDEZ,	:	
Appellee	:	SUBMITTED: September 24, 2001

OPINION

MADAME JUSTICE NEWMAN **DECIDED: March 7, 2003**

The Commonwealth of Pennsylvania (Commonwealth) appeals from an Order of the Superior Court that reversed the decision of the Court of Common Pleas of Lancaster County (trial court), which denied the petition of Ricardo Hernandez (Hernandez) for leave to appeal *nunc pro tunc*. In the same Opinion, the Superior Court proceeded to review the appellate claim of Hernandez and determined that it did not entitle him to relief. Accordingly, the Superior Court affirmed the Judgment of Sentence. For the reasons set forth herein, we affirm the Order of the Superior Court insofar as it determined that the trial

court erred in summarily dismissing the Petition of Hernandez to reinstate his appellate rights *nunc pro tunc*.

FACTS AND PROCEDURAL HISTORY

Hernandez pled guilty on September 20, 1996, to one count of robbery, one count of aggravated assault, one count of recklessly endangering another person, and three counts of criminal conspiracy. On January 17, 1997, the trial court sentenced Hernandez to the following: (1) five to ten years for robbery; (2) a consecutive term of two-and-one-half to five years for aggravated assault; and (3) two-and-one-half to five years on each of two of the conspiracy convictions, to be served concurrently to each other and concurrent to the other sentences. All other convictions merged for sentencing purposes. The sentence imposed by the trial court on Hernandez was greater than that recommended by the Sentencing Guidelines, but within the lawful maximum.

On February 14, 1997, Hernandez filed, through counsel, a notice of appeal, alleging that his sentence was unfair. On February 21, 1997, the trial court directed Hernandez to file a statement of matters complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), but Hernandez never filed such a statement. On October 7, 1997, the Superior Court dismissed the appeal of Hernandez, finding that he waived any challenge to the discretionary aspects of his sentence because he failed to object during imposition of the sentence, failed to file a post-sentence motion, and failed to file the 1925(b) statement, as directed by the trial court. Hernandez did not file a Petition for Allowance of Appeal with this Court and, thus, his Judgment of Sentence became final on November 6, 1997.

On July 17, 1998, Hernandez obtained new counsel, who filed a Petition for Leave to Appeal *nunc pro tunc* (NPT Petition), in which Hernandez alleged that he directed his prior counsel to take all necessary steps to perfect a direct appeal from the discretionary aspects of his sentence. Hernandez also alleged that his prior counsel was ineffective for failing to preserve a direct appeal challenge to the sentence. Hernandez requested that the trial court grant him leave to file a direct appeal to the Superior Court *nunc pro tunc*. On September 4, 1998, the trial court dismissed the petition and granted Hernandez leave to file a petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, subject to its provisions concerning timeliness and eligibility for relief. Hernandez appealed the dismissal of his NPT Petition to the Superior Court; he did not file a PCRA petition, even though he was within the one-year period for filing at that time.[1]

The Superior Court, in a published Opinion, reversed the Order of the trial court dismissing the NPT Petition, granted the appeal, but ultimately affirmed the Judgment of Sentence imposed by the trial court, concluding that the challenges Hernandez raised to the discretionary aspects of his sentence were without merit. Commonwealth v. Hernandez, 755 A.2d 1 (Pa. Super. 2000). The Superior Court reasoned that Hernandez filed his NPT Petition before this Court had rendered its decision in Commonwealth v. Lantzy, 736 A.2d 564 (Pa. 1999), in which we explained that "the PCRA provides the exclusive remedy for post-conviction claims seeking restoration of appellate rights due to counsel's failure to perfect a direct appeal . . . ." Id. at 570. Prior to our decision in Lantzy, the Superior Court had held that one could not bring a PCRA claim of ineffective assistance of counsel for failing to file an appeal challenging the discretionary aspects of a sentence. See, e.g., Commonwealth v. Petroski, 695 A.2d 844 (Pa. Super. 1997). The Superior Court

[1] 42 Pa.C.S. § 9545(b)(1).

opined that it was reasonable for Hernandez to rely on Petroski at the time he filed his NPT Petition. Judge Brosky[2] dissented on the ground that the trial court properly dismissed the NPT Petition.

We granted allocatur to address whether the Superior Court erred in reaching the merits of the NPT Petition filed by Hernandez. Hernandez has not participated in this appeal and had failed to file a brief; accordingly, the case was submitted on September 24, 2001.

DISCUSSION

This case concerns the retroactivity of our decision in Lantzy and, therefore, seems at first blush to be identical to Commonwealth v. Eller, 807 A.2d 838 (Pa. 2002). In Eller, the defendant pled *nolo contendre* to rape and was sentenced to six to twelve years imprisonment consecutive to eight years of probation on June 11, 1997. As in the case *sub judice*, the sentence imposed on Eller was greater than that recommended by the Sentencing Guidelines, but within the statutory limits. Eller did not seek to: (1) withdraw his plea; (2) have his sentence reconsidered; or (3) file a direct appeal. Therefore, his sentence became final on July 11, 1997. On August 6, 1998, Eller filed a *pro se* motion to appeal *nunc pro tunc*, contending that counsel who represented him during his guilty plea refused to file a direct appeal, despite Eller's request that he do so. The Superior Court denied the motion on August 24, 1998. Eller immediately filed a motion to appeal *nunc pro tunc* in the trial court, which the court denied on the same day. Eller filed a motion for reconsideration, which the trial court denied. On appeal, the Superior Court treated the

[2] Judge Brosky has since assumed senior status.

motion as a timely notice of appeal from the decision of the trial court to deny the request of Eller for permission to appeal *nunc pro tunc*.

On September 1, 1999, the Superior Court affirmed the denial of *nunc pro tunc* relief, reasoning that Eller had failed to comply with the timeliness requirements of the PCRA and that, based on the decision of this Court in Lantzy, decided July 7, 1999, the PCRA provided the exclusive remedy for a claimant seeking restoration of appellate rights. After the decision of the Superior Court in Eller, however, the Superior Court published two *en banc* decisions, in which it determined that Lantzy should not apply retroactively to claimants who filed their requests for *nunc pro tunc* appellate rights before we filed Lantzy. See Commonwealth v. Hitchcock, 749 A.2d 935 (Pa. Super. 2000) (*en banc*), and Commonwealth v. Garcia, 749 A.2d 928 (Pa. Super. 2000) (*en banc*).

We granted allocatur in Eller to address the retroactivity of Lantzy in light of the diametrically opposite decisions in Eller and Hitchcock/Garcia. In a majority opinion authored by Mr. Justice Castille, this Court determined that application of the Lantzy decision to Eller's situation was not unlawfully retroactive because "Lantzy did not overrule, modify, or limit any previous case from this Court on the question" and the decision "was premised, at least in part, upon this Court's previous plain meaning construction of the exclusivity language" contained in the PCRA. Eller, 807 A.2d at 844. Therefore, we affirmed the Order of the Superior Court denying Eller the right to appeal *nunc pro tunc*.

Despite their apparent similarity, Eller and the present case are not the same. The Judgment of Sentence imposed on Eller became final on July 11, 1997; Eller did not file his motion to appeal *nunc pro tunc* until August 6, 1998, outside of the one-year time limitation for PCRA petitions. Hernandez, however, filed his NPT Petition less than nine months after

his Judgment of Sentence became final. In Eller, we expressly distinguished the Hernandez situation, stating the following:

> The circumstance that aggrieves [Eller] arises not from his alleged reliance upon Superior Court decisions leading him to employ an incorrect form or title for his collateral action--*i.e.*, seeking *nunc pro tunc* relief via a non-PCRA filing rather than via a PCRA petition--but from his **tardiness** in initiating any collateral attack at all. [Eller] did not seek collateral relief in the form of an appeal *nunc pro tunc* until more than one year after his judgment of sentence became final. At that point, any petition he filed under the PCRA would have been time-barred, unless he could prove an exception to the time-bar. Thus, [Eller]'s present request for "equitable" relief seeks an unintended benefit that was, at best, collateral to the Superior Court's pre-Lantzy holding that this type of claim was not cognizable under the PCRA: the benefit of not being subject to the PCRA's period of limitations. Even if the PCRA authorized this Court to recognize equitable exceptions to its period of limitations, we would not be inclined to fashion one under such circumstances. [Eller] could have preserved his claim simply by invoking the lower court's jurisdiction within one year of final judgment. His failure to do so results in the unreviewability of his claim under the PCRA's time-bar.

Eller, 807 A.2d at 846 (emphasis in original; footnote omitted). Thus, we determined that Eller's failure to file a collateral attack, whether or not termed a "PCRA Petition," within one year of his Judgment of Sentence becoming final, barred him from seeking reinstatement of his appellate rights *nunc pro tunc*.

Unlike Eller, Hernandez did not file his collateral attack as a NPT Petition to avoid the jurisdictional time bar of the PCRA; Hernandez filed his NPT Petition well in advance of the expiration of the year following the finality of his Judgment of Sentence. Additionally, at the time Hernandez filed his NPT Petition, we had not yet decided Lantzy. Therefore, Hernandez reasonably relied upon the decisions of the Superior Court in Petroski, Commonwealth v. Hall, 713 A.2d 650 (Pa. Super. 1998), reversed, 771 A.2d 1232 (Pa.

2001), and Commonwealth v. Lantzy, 712 A.2d 288 (Pa. Super. 1998), reversed, 736 A.2d 564 (Pa. 1999), in which the Superior Court explained that the PCRA is not available for those seeking reinstatement of appellate rights *nunc pro tunc* unless they are asserting actual innocence, a standard not required for a direct appeal. The Commonwealth correctly notes that Hernandez did not refer to any of these decisions in his NPT Petition. However, Hernandez had no reason to reference those decisions, as the Superior Court had been consistent in its rulings.

The Commonwealth also draws our attention to the fact that the trial court, in its September 4, 1998 Order, granted Hernandez leave to file a PCRA Petition. However, we still had not decided Lantzy at that point, so Hernandez, who was challenging his sentence, would not have been entitled to PCRA relief because he was not asserting actual innocence. Thus, we cannot fault Hernandez for appealing the denial of his NPT Petition to the Superior Court instead of filing a PCRA Petition. As the Superior Court points out, Hernandez was "caught in a jurisdictional trap of our making." Hernandez, 755 A.2d at 10. Where a defendant adheres to a procedure specifically authorized by the highest court of the Commonwealth to rule on the issue, we will not fault the defendant for following that procedure, even if it is later determined to be incorrect. See Commonwealth v. Tyson, 635 A.2d 623, 624-625 (Pa. 1993) ("we conclude that while the issues presented here were, indeed, previously raised and decided in appellant's direct appeal and, thus, under the PCRA were finally litigated, fairness dictates that we permit collateral relief. Appellant reasonably concluded from the wording of [an Order] that it was this Court's intention to permit her to seek collateral relief . . . .").

Because Hernandez filed his NPT Petition before the one-year period following the finality of his Judgment of Sentence expired and because the prevailing procedural rule at

the time was that articulated by the Superior Court in Petroski, Hall, and Lantzy, the trial court should not have summarily dismissed the NPT Petition. The Superior Court found that counsel for Hernandez rendered ineffective assistance, granted the NPT Petition, but ultimately denied the *nunc pro tunc* appeal. However, we cannot consider whether the Superior Court correctly granted the NPT Petition and denied the appeal because Hernandez did not file a Petition for Allowance of Appeal from the Order of the Superior Court.

CONCLUSION

We affirm the decision of the Superior Court as it relates to the propriety of dismissing the NPT Petition filed by Hernandez. We express no opinion on the correctness of the conclusion of the Superior Court that Hernandez was entitled to appeal *nunc pro tunc* and that Hernandez failed to raise a claim in that appeal that would have entitled him to relief.

Mr. Chief Justice Cappy files a concurring opinion in which Mr. Justice Castille joins.

Mr. Justice Eakin did not participate in the consideration or decision of this case.