

**[J-79-2007]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 50 EAP 2006
	:	
Appellant	:	Appeal from the Opinion and Order of the
	:	Superior Court dated October 8, 2005 at
v.	:	No. 25 EDA 2005 vacating the judgment
	:	of sentence entered by the Court of
	:	Common Pleas of Philadelphia County
	:	dated December 13, 2004 at No. 0406-
ROBERT RATSAMY,	:	0282
	:	
Appellee	:	SUBMITTED: June 25, 2007

**CONCURRING OPINION**

**MR. JUSTICE BAER**

**DECIDED: November 20, 2007**

I join the substance of the Majority Opinion in full, but write separately to distance myself from its response to the Dissenting Opinion's call for a remand regarding Defendant Robert Ratsamy's entitlement to counsel. The Majority suggests that we need not address the issue because it was not raised before this Court. The Majority's conclusion, however, hits at the very heart of the potential fundamental unfairness of the present situation: Defendant has no counsel to raise the issue because this Court granted his attorney's petition to withdraw, but nevertheless Defendant is charged with failing to raise such issue. Nonetheless, I conclude that a remand is unnecessary in this case because Defendant was provided with notice of the withdrawal of his counsel, and the potential consequences thereof. I believe that the notice ameliorates my considerable concern for fundamental fairness were this Court to permit a party's counsel to withdraw without ensuring that the party was aware of the withdrawal.

The facts of this case place Defendant in an apparent gap in the law that otherwise provides indigent criminal defendants with a right or entitlement to counsel at all stages of litigation and a formalized procedure to waive the right or entitlement to counsel on the record. As noted by the Dissenting Opinion, Defendant had *appointed* counsel in the proceedings before the trial court. He *retained* private counsel in his appeal to the Superior Court, which granted him relief, reversing his conviction in October 2005. After this Court granted the Commonwealth's petition for review in December 2006, retained counsel petitioned to withdraw claiming that he was retained solely to represent Defendant on his appeal to the Superior Court and had not been compensated to represent him in the Commonwealth's appeal to this Court. Based on these assertions, we granted retained counsel leave to withdraw on May 18, 2007.

Subsequently, this Court's Prothonotary ascertained Defendant's address, given his release from prison following the Superior Court's decision.<sup>1</sup> Indeed, the Prothonotary's office evidently spoke to Defendant by telephone, as evidenced by a subsequent letter, which provided:

I write as a follow-up to our phone conversation of June 6, 2007. As we discussed, the Court allowed your attorney to withdraw from your case before a brief was submitted on your behalf. As a result, you must immediately retain new counsel or [advise] this office that you will proceed pro se in this matter. It is imperative that you make a decision quickly since the brief on your behalf is currently due. Please note that you do not have the ability to discontinue or withdraw this matter because the appeal was filed by the Commonwealth.

Letter from Deputy Prothonotary John W. Person, June 8, 2007. The Prothonotary requested a response by June 13, 2007. When Defendant did not respond, the

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<sup>1</sup> Given the nature of our Prothonotary's role within a case, obviously many of its communications are not introduced, docketed, or otherwise formally made "of record." Nevertheless, they are kept with this Court's publically accessible file in this case, and are essential to a determination that Defendant's fundamental rights were protected.

Prothonotary submitted the case on June 25, 2007 on the brief filed by the Commonwealth, opening the way to this Court's decision today.

Based on Defendant's apparent lack of response to the above letter and his failure to request the appointment of counsel, I join the Majority's rejection of the remand called for by the Dissent, despite the seeming incongruity of the present situation where the defendant has a potential entitlement to counsel both before and after the proceedings before this Court, but not during these proceedings. It is beyond cavil that an indigent defendant has a federal constitutional right to be provided counsel at trial and on any direct appeal as of right. Ross v. Moffitt, 417 U.S. 600, 610, 94 S.Ct. 2437, 2443 - 2444 (1974). The High Court, however, has concluded that a state is not constitutionally required to provide counsel to the indigent for purposes of discretionary appeal. Id.

The federal analysis, however, does not end our consideration of Defendant's entitlement to counsel. Under Pa.R.Crim.P. 122,<sup>2</sup> we have held that an indigent defendant

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<sup>2</sup> **Rule 122. Appointment of Counsel**

(A) Counsel shall be appointed:

(1) in all summary cases, for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed;

(2) in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel;

(3) in all cases, by the court, on its own motion, when the interests of justice require it.

(B) When counsel is appointed,

(1) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order

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in Pennsylvania is entitled to the assistance of counsel in seeking allowance of appeal. Commonwealth v. Liebel, 825 A.2d 630 (Pa. 2003). Moreover, under Rule 122, when counsel is appointed, the appointment is effective through all proceedings on direct appeal including proceedings before this Court following the grant of discretionary appeal. Pa.R.Crim.P. 122(B)(2). The rule, however, does not address the instant situation in which Defendant did not have appointed counsel on appeal to the Superior Court but rather retained counsel, the same counsel that we permitted to withdraw. Thus, the fact that Defendant once retained counsel appears, for want of a more particular rule, to entitle Defendant to less counsel than if he had appointed counsel throughout the proceedings, without regard to whether he still has adequate resources to retain new counsel.

Notably, following disposition of any discretionary appeal in this Court, Defendant's entitlement to counsel re-emerges, assuming his indigence, under our rules of procedure governing collateral review under the Post Conviction Relief Act. Pa.R.Crim.P. 904.<sup>3</sup> As

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shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and

(2) the appointment shall be effective until final judgment, including any proceedings upon direct appeal.

(C) A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons.

<sup>3</sup> Rule 904. Entry of Appearance and Appointment of Counsel; *In Forma Pauperis*

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(C) Except as provided in paragraph (H), when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief.

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under the rules for direct review, any appointment of counsel continues through the exhaustion of the PCRA process. Pa.R.Crim.P. 904(F)(2).

Moreover, wherever there is an entitlement to counsel, either constitutional or rule-based, there is generally a formal procedure in place designed to ensure that any waiver of the right or entitlement is voluntary, knowing, and intelligent. See Pa.R.Crim.P. 121 (“When the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel.”); Pa.R.Crim.P. 904(H)(1) (providing that the PCRA judge shall appoint counsel for the purpose of post-conviction collateral review in a capital case, unless the judge determines that the defendant knowingly, intelligently, and voluntarily waived that entitlement). I additionally have little doubt that a PCRA court presented with counsel’s withdrawal in a non-capital case similarly would conduct a hearing or colloquy on the record to determine how a defendant would like to proceed.

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(D) On a second or subsequent [PCRA] petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 908, the judge shall appoint counsel to represent the defendant.

(E) The judge shall appoint counsel to represent a defendant whenever the interests of justice require it.

(F) When counsel is appointed,

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(2) the appointment of counsel shall be effective throughout the post-conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.

Faced with a gap in a defendant's entitlement to counsel during the discretionary appeal before this Court and the absence of any formalized procedure to determine whether the defendant wishes to represent himself, retain counsel, or request appointed counsel, I recommend the Criminal and Appellate Rules Committees consider whether a rule or rules should be drafted to protect a defendant's interests in the event that retained counsel withdraws during a discretionary appeal to this Court. Nonetheless, in the present case, I am able to join the Majority Opinion on the merits because the actions of our Court's Prothonotary in this case render these unusual proceedings harmless to Defendant's interests.