[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
	:	No. 25 EDA 2005 vacating the judgment
v.	:	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

DISSENTING OPINION

MADAME JUSTICE BALDWIN **DECIDED: November 20, 2007**

I am unable to join the majority opinion. My reasons for dissenting stem not from the merits of the case, but from the manner in which this case was decided. In short, after the Commonwealth filed its brief in this case, Appellee's counsel was permitted to withdraw by a one-sentence order from this Court.[1] New counsel was not appointed. The Commonwealth's appeal moved on. The matter was not remanded for a determination if Appellee was eligible for court-appointed counsel. Appellee did not effectuate a waiver of counsel, nor has he ever indicated that he desires to proceed pro se. Now, this Court chooses to issue its opinion on the merits, but does so with full knowledge that it is without the benefit of advocacy on Appellee's behalf. The result of this significant event is to restore a criminal conviction against Appellee. I find no compelling, or even reasonable,

[1] Commonwealth v. Ratsamy, 50 EAP 2006, per curiam (May 18, 2007) ("AND NOW, this 18th day of May, 2007, the Petition for Leave to Withdraw is granted.")

justification for proceeding in such a manner. As such, I would remand this case for a determination of whether Appellee is entitled to counsel, because our adversarial system requires no less.

It is clear that a criminal defendant does not have a *federal* constitutional right to counsel beyond appeals as of right. See Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 839 (1985) (citing Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 (1974), for the proposition that "a criminal defendant has a right to counsel only on appeals as of right, not on discretionary state appeals"). However, it remains an open question whether a criminal defendant has a constitutional right to counsel, under the Pennsylvania Constitution, for any appeals beyond those of right, such as petitioning this Court for discretionary review and any subsequent proceedings. Commonwealth v. Liebel, 573 Pa. 375, 381 n.6, 825 A.2d 630, 633 n.6 (2003).

Regardless of the existence of a state constitutional right to counsel that extends through the discretionary review process, this Court nonetheless held in Liebel that a criminal defendant "clearly has a rule-based right to counsel under Pennsylvania Rule of Criminal Procedure 122 . . . " Id. at 380, 825 A.2d at 633. In Liebel, appellate counsel informed the Appellant by letter that his appeal was unsuccessful in the Superior Court, but that he would file a Petition for Allowance of Appeal (PAA) to this Court. Id. at 377-78, 825 A.2d at 632. However, counsel failed to file the PAA within the thirty day requirement. The Appellant filed a PCRA[2] petition seeking to have his right to file a PAA reinstated nunc pro tunc. The PCRA court denied relief, finding, inter alia, that the Appellant had no constitutional right to counsel on discretionary appeal to this Court. Id. at 380, 825 A.2d at 633. The Superior Court summarily affirmed citing the PCRA court's opinion. Id. at 379, 825 A.2d at 632.

[2] Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

This Court reversed. Irrespective of a constitutional mandate, this Court examined Pa.R.Crim.P. 122, which provides, in pertinent part, that "[w]here counsel has been assigned, such assignment shall be effective until final judgment, including any proceedings on direct appeal." Pa.R.Crim.P. 122(B)(3) (emphasis added).[3] [4] Relying on this rule and our per curiam opinion in Commonwealth v. Daniels, 491 Pa. 289, 420 A.2d 1323 (1980),[5] we held that a criminal defendant "is entitled to the assistance of counsel though his discretionary appeal to this Court on direct appeal." Liebel, 573 Pa. at 381, 825 A.2d at 633.

The Liebel decision is not, of course, wholly dispositive of this situation. Indeed, the substantial differences between that decision and the matter sub judice have not been addressed by this Court. First, the issue in Liebel involved the failure to file a PAA in a direct appeal, which is a matter of right, and not the subsequent discretionary proceedings. However, nothing in the Liebel opinion indicates that the statutory right to counsel acknowledged there is not to be extended to filing a brief and arguing the case before the Court. To the contrary, the holding of the case, that a criminal defendant "is entitled to the assistance of counsel through his discretionary appeal to this Court on direct appeal" indicates that counsel's duties go beyond the mere filing of a PAA. Moreover, Rule 122,

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[3] At the time of the Liebel decision, this paragraph was included in subsection (C)(2). The rule was subsequently renumbered and the relevant portion of the rule is now found in subsection (B)(2).

[4] The Comment to this rule provides that ". . . counsel retains his or her appointment until final judgment, which includes all avenues of appeal through the Supreme Court of Pennsylvania." Pa.R.Crim.P. 122 cmt.

[5] In Daniels, in a per curiam opinion, we ordered the petitioner's court appointed counsel to file a PAA, despite counsel's refusal to do so. We explained that the right to counsel extends to petitioning this Court for discretionary review, when desired by the petitioner. Daniels, 491 Pa. at 291, 420 A.2d at 1323.

and the accompanying comment, see note 4, supra, make it clear that appointed counsel must continue with his or her representation until the final judgment, including any action taken by this Court.

The second notable difference is that in Liebel counsel was appointed, where, here, counsel was privately retained. Rule 122 clearly imposes its requirements only on appointed counsel. See generally Pa.R.Crim.P. 122 (entitled "Appointment of Counsel"). Nonetheless, the Liebel Court read this rule as providing a criminal defendant with a right to counsel through the entire direct appeal process, provided that the defendant meets the requirements for court-appointed counsel. Thus, if Appellee is now financially eligible for court appointed counsel, under Liebel he is entitled to the assistance of counsel in this case. Here, Appellee's private counsel was permitted to withdraw based on Appellee's failure to pay counsel for his services. Therefore, Appellee may be without funds and may well meet the requirements to have counsel appointed for him.[6] However, he was never given the opportunity to demonstrate this. Rather, this Court proceeds forward in spite of Liebel and decides the case without providing Appellee with an opportunity to obtain counsel.

Lastly, in Liebel, the defendant was the Appellant. Here the defendant is the Appellee. However, neither Liebel nor Rule 122 limits the right to counsel through any proceedings in this Court to the party bringing the appeal. I am not in a position to speculate as to future holdings on this issue, or the others above. This is not the case in which to make those determinations.

Despite the differences between Liebel and the instant case, the Liebel holding is clear that an indigent defendant is entitled, via Pa.R.Crim.P. 122, to counsel through any

[6] The trial court docket sheet reflects that Appellee was initially represented by the Defender Association.

proceedings in this Court. Thus, unless this Court limits this right to exclude people in Appellee's situation, the proper and just course of action would be to remand the case to the trial court to determine if Appellee is, in fact, indigent and falls under the purview of Rule 122. If so, counsel must be appointed.

In this case, Appellee's liberty is at stake. He was convicted of a crime, which was then vacated by the Superior Court. This Court now reinstates the conviction without advocacy from Appellee. Plainly put, there is no compelling, or even reasonable, justification for doing so without first remanding the case for the appointment of counsel, provided Appellee is determined to be indigent. Of course, remanding for the appointment of counsel and the subsequent preparation of a brief would necessarily delay the resolution of this case. However, expediency in this case pales in comparison to Appellee's interest. I cannot see that a remand would cause harm or prejudice to any party involved.

There is, however, a compelling reason to justify a remand. This Court, as well as all those that are bound by and rely on our decisions, benefit from dual advocacy. Decisions should be made *only* after thoughtful and careful consideration of the law and both sides of the argument. Briefing and argument by the skilled and competent attorneys of this Commonwealth are invaluable assets to the functioning of the judiciary. While we sit as the final arbiters in this Commonwealth, it would be arrogant to believe we can, or should, decide cases without advocacy from the parties. Whether the case involves a pure question of law, an application of a set of facts to an established principle, or a question of constitutional magnitude is of no moment. We should not venture into the waters of unilateral decision-making no matter the type of case involved.

There are, of course, situations where a party waives his or her right to present an argument to this Court, a decision that would undoubtedly be rare. This case may well be one of those situations, but we do not yet know. Appellee could choose to proceed pro se or not to file a brief at all. He may demonstrate that he is indigent and that he desires

representation. He should be given the opportunity to do so, particularly where the case law, while not yet explicitly stated by this Court, is fairly clear that he has a right to court appointed counsel until final judgment of a case, including in proceedings before this Court.

In sum, Appellee's counsel was permitted to withdraw during the briefing process. Appellee gave no indication that he desired to proceed without an attorney or wanted to represent himself.[7] Moreover, he was not given an opportunity to demonstrate that he was indigent and desired the assistance of court appointed counsel. The Court nonetheless decides this case without a brief from Appellee. It does so without any justification. I cannot join a decision rendered in this fashion. Therefore, I dissent.

[7] If Appellee represented himself, he would be subject to all of the procedural rules that an attorney may be more familiar with, including the time limit and format for filing a brief with this Court. Commonwealth v. Starr, 541 Pa. 564, 580-82, 664 A.2d 1326, 1334-35 (1995). However, we cannot merely assume that Appellee desired to represent himself or was able to afford another attorney and chose not to.

Moreover, Appellee was never given the opportunity to waive his right to an attorney. Typically, wavier of counsel is governed by Pa.R.Crim.P. 121. However, it is unclear whether the rule applies to situations, as is the case here, where the right to counsel stems not from a constitutional guarantee but from a rule promulgated by this Court or from a statute. However, in the context of the PCRA, where the right to counsel is statutorily provided, a person choosing to waive that right can only do so after an on-the-record colloquy is held to ascertain whether the waiver is knowing, intelligent, and voluntary. Commonwealth v. Grazier, 552 Pa. 9, 13,713 A.2d 81, 82 (1998). A similar colloquy should be conducted here before we proceed as if Appellee waived his rule-based right to counsel.