

[J-97-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 50 WAP 2000
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered September 1, 1999, at No.
	:	1648PGH98, affirming the Order of the
v.	:	Court of Common Pleas of Erie County
	:	entered August 24, 1998, at No.
	:	2824of1995.
BRIAN CHARLES ELLER,	:	
	:	
Appellant	:	ARGUED: September 11, 2001
	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: SEPTEMBER 25, 2002

I agree with the majority that Appellant is not entitled to reinstatement of his appellate rights *nunc pro tunc* outside of the framework of the PCRA. However, as expressed in my concurring opinion in Commonwealth v. Hall, 771 A.2d 1232 (Pa. 2001), I would grant equitable relief when the facts establish that the defendant reasonably relied in good faith upon his attorney to perfect his appellate rights. Thus, I must dissent from the majority's application of a per se rule forbidding *nunc pro tunc* relief outside of the framework of the PCRA under all circumstances.

In Commonwealth v. Lantzy, 736 A.2d 564, 570 (Pa. 1999), this Court made clear 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. The Court further concluded that where there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in

criminal cases, denies the accused his constitutional rights to assistance of counsel and to direct appeal, and constitutes prejudice for purposes of 42 Pa.C.S. § 9543(a)(2)(ii). Lantzy, 736 A.2d at 572. Thus, in such circumstances, and where the remaining requirements of the PCRA are satisfied, a petitioner establishes ineffectiveness of counsel, and the remedy for the deprivation of the fundamental right of direct appeal is its restoration. See id. at 572-73.

Subsequent to our decision in Lantzy, we granted allocatur in Commonwealth v. Hall to determine whether Hall, who failed to file a direct appeal and subsequently filed an untimely PCRA petition to restore his waived direct appeal, could obtain reinstatement of his direct appeal rights *nunc pro tunc* outside of the PCRA. Citing the plain language of the PCRA and our decision in Lantzy, the Court concluded that Hall's request for a direct appeal *nunc pro tunc* premised on counsel's alleged ineffectiveness for failing to file a direct appeal was a claim that unquestionably was available to him under the PCRA. Hall, 771 A.2d at 1235-36. However, because Hall had not raised this claim in a timely PCRA petition, we reversed the trial court's order granting leave to file an appeal *nunc pro tunc*. Id. at 1236.

I filed a concurring opinion Hall, concluding that while I agreed with the majority that Hall was not entitled to relief under the facts of his case, I would have required a different result had the facts established that Hall reasonably relied in good faith upon counsel to protect his appellate rights. My explanation for this conclusion in Hall accurately expressed my continuing sentiments:

I am troubled by the prospect that a defendant who, for example, instructed counsel to file a direct appeal, was told by counsel that an appeal was being filed, was subsequently reassured by counsel that the appeal was filed, but later found out after the one-year limitation period expired that counsel never filed the appeal, is forever precluded from receiving at least one appellate review of his case. In my view, a rule that penalizes a defendant who reasonably relies in good faith upon his counsel to protect his appellate rights

is contrary to the purpose of the PCRA, and such a defendant should be entitled to, at a bare minimum, one appellate review.

Id. at 1237 (Nigro, J., concurring).

Just as I did not join the bright-line approach adopted by the majority in Hall, I cannot endorse the application of that per se rule in the instant case. However, I agree with the majority's ultimate conclusion here because, like the defendant in Hall, Appellant failed to establish that he reasonably relied in good faith upon his attorney to protect his appellate rights and therefore is not, in my view, entitled to *nunc pro tunc* relief. Although Appellant asked counsel to file an appeal, there is simply no evidence that counsel agreed to file an appeal on Appellant's behalf, or that he subsequently reassured Appellant that he would file an appeal or take any action on Appellant's behalf. In fact, counsel specifically informed Appellant that he would not file an appeal because he could not identify any meritorious issues. Accordingly, I concur in the result reached by the majority in the instant case.