2014 PA Super 75

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JARED HENKEL, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 376 WDA 2012

Appeal from the PCRA Order February 13, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at Nos.:
CP-02-CR-0005481-2002
CP-02-CR-0005955-2002
CP-02-CR-0005956-2002

BEFORE: BENDER, P.J., FORD ELLIOTT, P.J.E., BOWES, J., GANTMAN, J., DONOHUE, J., ALLEN, J., LAZARUS, J., OTT, J., and WECHT, J.

DISSENTING OPINION BY BENDER, P.J. FILED: April 11, 2014

I respectfully disagree with the Majority's conclusion that we are unable to review Appellant's first three claims challenging his PCRA counsel's representation. As discussed herein, I do not believe that there has been a binding, precedential decision by our Supreme Court prohibiting review of such issues for the first time on appeal, especially under the procedural posture of this case. Moreover, contrary to the Majority's view, I think that this Court has presented conflicting opinions on the question of when, if ever, PCRA counsel's ineffectiveness may be challenged for the first time on appeal. ***See Commonwealth v. Ford***, 44 A.3d 1190 (Pa. Super. 2012); ***Commonwealth v. Burkett***, 5 A.3d 1260 (Pa. Super. 2010). For the reasons that follow, I would resolve these conflicting panel decisions by

overruling ***Ford*** and upholding ***Burkett***, which permits our review of Appellant's ineffectiveness claims.

In ***Commonwealth v. Ligons***, 971 A.2d 1125 (Pa. 2009), our Supreme Court squarely addressed the question of whether an appellant may challenge PCRA counsel's stewardship for the first time on appeal. Because the Court was evenly split on the issue, ***Ligons*** is not precedential authority. ***See Interest of O.A.,*** 552 Pa. 666, 717 A.2d 490, 496 n. 4 (1998) ("While the ultimate order of a plurality opinion, *i.e.* an affirmance or reversal, is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority.").

Several months later, the Supreme Court issued its decision in ***Commonwealth v. Pitts***, 981 A.2d 875, 887 (Pa. 2009), in which it remarked, in a footnote, that the petitioner waived his challenge to PCRA counsel's ineffectiveness by not raising this claim "prior to his PCRA appeal." ***Id.*** at 880 n.4. This statement had no impact on the Court's decision in ***Pitts***; indeed, as Justice Baer expressed in his dissenting opinion, the footnoted comment went "far beyond [the] narrow issue" on which the Court granted *allocatur*. ***Id.*** at 887 (Baer, J., dissenting opinion).[1] Accordingly, I

[1] The ***Pitts*** Court granted *allocatur* to examine whether this Court erred by *sua sponte* evaluating the sufficiency of PCRA counsel's 'no-merit' letter and petition to withdraw under ***Commonwealth v. Turner***, 544 A.2d 927 (Pa.

believe that the footnote in ***Pitts*** constitutes non-binding *dicta*. ***See Commonwealth v. Perry***, 798 A.2d 697, 715 (Pa. 2002) (Castille, J., joined by Newman, J., concurring) (stating prior case law is only binding "with respect to propositions which were actually at issue, and actually decided, in the case. Broad but non-essential 'declarations' are not precedent; ultimately, their inherent wisdom and persuasiveness determine whether they will play any role in future decisions.") (citing ***Commonwealth v. Blouse***, 531 Pa. 167, 611 A.2d 1177, 1182 (1992) (Flaherty, J., joined by Zappala and Cappy, JJ., dissenting) (stating although *dicta* may be instructive in predicting direction of court, it is not precedential authority)).

Admittedly, since ***Pitts***, our Supreme Court has repeatedly cited ***Pitts*** in stating that petitioners have waived claims of PCRA counsel's ineffectiveness for failing to raise it below.[2] However, in none of those cases was the waiver issue actually before the Court or necessary to the Court's decision, as evidenced by the fact that the Court always confined its remarks on waiver to footnotes.[3] As Chief Justice Castille has stated, "[*d*]*icta* is not

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1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). ***See Pitts***, 942 A.2d at 893.

[2] ***See Commonwealth v. Jette***, 23 A.3d 1032, 1044 n.14 (Pa. 2011); ***Commonwealth v. Hill***, 16 A.3d 484, 497 n.17 (Pa. 2011); ***Commonwealth v. Colavita***, 993 A.2d 874, 894 n.12 (Pa. 2010).

[3] I discuss the issues before the Court in ***Jette*** and ***Hill*** in more detail, *infra*. As the Majority concedes, in the ***Colavita*** footnote mentioning waiver, the

converted into binding constitutional precedent through repetition." ***Perry***, 798 A.2d at 715 (citation omitted).

Because our Supreme Court has not issued a precedential decision on this "hotly contested issue," ***Pitts***, 981 A.2d at 887 (Baer, J., dissenting opinion), I believe that the binding authority in this area are the decisions of this Court. Where, as here, a PCRA hearing was held and no Pa.R.Crim.P. 907 notice was issued, there are two cases from this Court, ***Burkett*** and ***Ford***, which address whether we may review claims of PCRA counsel's ineffectiveness raised for the first time on appeal. In my opinion, those three-judge panel decisions are irreconcilably conflicting.

First, in ***Burkett***, the petitioner filed a *pro se* PCRA petition and, due to delays not relevant to the instant issue, it was not until thirteen years later that counsel was appointed and an amended petition was filed. ***Burkett***, 5 A.3d at 1266. The court then held a PCRA hearing, after which it denied relief to the petitioner. ***Id.*** The petitioner filed a timely appeal, sought to proceed *pro se*, and was granted that request. ***Id.*** On appeal, he argued for the first time that his PCRA counsel was ineffective. While we acknowledged our Supreme Court's statement in ***Pitts*** that the petitioner's failure to respond to the court's Rule 907 notice waived his claims of PCRA counsel's ineffectiveness on appeal, we concluded that ***Pitts*** was

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Court expressly stated that the issue of waiver was not before it. ***Colavita***, 993 A.2d 894 n.12; Majority Opinion at 23, 24.

inapplicable because the PCRA court had conducted an evidentiary hearing rather than issuing a Rule 907 notice. ***Id.*** at 1273. Furthermore, we noted that our Supreme Court specifically addressed this issue in ***Ligons***, but reached a non-precedential plurality decision in that case. ***Id.*** Accordingly, we concluded that the "binding precedent in this area" was this Court's decision in ***Commonwealth v. Lauro***, 819 A.2d 100 (Pa. Super. 2003), which permitted review of such a claim for the first time on appeal. ***Burkett***, 5 A.3d at 1273; ***see also Lauro***, 819 A.2d at 109.[4] We then assessed the appellant's claim of PCRA counsel's ineffectiveness in ***Burkett***, concluding that it was meritless.[5] ***Id.***

[4] In ***Lauro***, we explained that "if, on a claim of PCRA ineffectiveness, we determine that there is a reasonable probability that, but for PCRA counsel's act or omission, the result of the PCRA proceeding would have been different, we would be required to remand for a new PCRA hearing." ***Burkett***, 5 A.3d at 1273 (citing ***Lauro***, 819 A.2d at 109).

[5] I acknowledge that due to the timing of our Supreme Court's decision in ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), it was inapplicable in both ***Lauro*** and ***Burkett***. The same is not true in the present case. However, the ***Burkett*** panel did not expressly rely on the inapplicability of ***Grant*** to distinguish ***Burkett*** from ***Pitts***. ***See Burkett***, 5 A.3d at 1273. Moreover, while ***Grant*** abolished the rule set forth in ***Commonwealth v. Hubbard***, 372 A.2d 687 (Pa. 1977), which *required* IAC claims to be presented at the first opportunity (which often resulted in such claims being raised for the first time on appeal), ***Grant*** did not expressly *prohibit* appellate courts in this Commonwealth from addressing claims of PCRA counsel's ineffectiveness for the first time on appeal. If it had, "[t]he issue of whether a PCRA petitioner can raise a claim of PCRA counsel ineffectiveness for the first time after a notice of appeal was filed in post-***Grant*** petitions" would not have "come to a head in ***Ligons***…." Majority Opinion at 18.

Less than two years later, this Court reached the opposite result in ***Ford***. There, the defendant filed a *pro se* PCRA petition, counsel was appointed, and, after conducting an evidentiary hearing, the court ultimately denied relief to the petitioner. ***Ford***, 44 A.3d at 1193. New counsel was appointed to handle the petitioner's appeal, and in the petitioner's Pa.R.A.P. 1925(b) statement, he argued for the first time that his initial PCRA counsel acted ineffectively. ***Id.*** at 1194-95. This Court discussed our Supreme Court's plurality decision in ***Ligons***, and the Court's statements in ***Pitts*** and its progeny on the waiver of PCRA counsel ineffectiveness claims. ***Id.*** at 1195-1198. Moreover, in regard to pertinent decisions by this Court, we acknowledged our conclusion in ***Burkett*** that ***Pitts*** did not prohibit review of the ineffectiveness of PCRA counsel claims where no Rule 907 notice had been filed. ***Id.*** at 1199. However, we did not expressly distinguish ***Burkett*** or state why it was inapplicable to the circumstances in ***Ford***.[6] Instead, the

[6] The ***Ford*** panel did indicate that intervening, post-***Burkett*** Supreme Court decisions supported our holding in ***Ford***, citing concurring and/or dissenting opinions by Justice Saylor in ***Commonwealth v. Paddy***, 15 A.3d 431 (2011) (Saylor, J. concurring and dissenting) ("[A] majority of the [Supreme] Court appears to be suggesting that there effectively can be no state-level redress for such deficient stewardship [of PCRA counsel]."), and ***Hill***, 16 A.3d at 498 (Saylor, J. dissenting) (acknowledging "the apparent curtailment of an enforcement mechanism to assure the evenhanded enforcement of a capital post-conviction petitioner's rule-based right to assistance of counsel and the concomitant requirement of effective stewardship"). While I agree that Justice Saylor's comments *suggest* that our Supreme Court wants to preclude review of PCRA counsel ineffectiveness claims raised for the first time on appeal, neither ***Paddy*** nor ***Hill*** (or any other decision by the Supreme Court to date) has expressly held as much.

Ford panel summarily stated that "a majority of the Supreme Court agrees that the issues of PCRA counsel ineffectiveness must be raised in a serial PCRA petition or in response to a notice of dismissal before the PCRA court." ***Id.*** at 1200. Accordingly, we concluded that we could not review the appellant's claims of PCRA counsel's ineffectiveness because they were raised for the first time after the notice of appeal had been filed. ***Id.*** at 1201.

I interpret these two decisions as conflicting. In both ***Burkett*** and ***Ford***, an evidentiary hearing was conducted, there was no Rule 907 notice or petition to withdraw filed by counsel, and the petitioner attempted to raise the ineffectiveness of his PCRA counsel at the first opportunity, *i.e.* in his Rule 1925(b) statement or brief to this Court. In ***Burkett***, this Court reviewed the petitioner's ineffectiveness claim, while in ***Ford*** we found it waived.

The Majority reconciles these conflicting decisions by relying on the "intervening case law" of ***Jette*** and ***Hill***. Majority Opinion at 27. As with the previously discussed Supreme Court cases mentioning the waiver of PCRA counsel ineffectiveness claims, I conclude that neither ***Hill*** nor ***Jette*** constitutes precedential authority on this issue.

Accordingly, these decisions do not diminish the applicability of ***Burkett*** to the instant facts, or cure its apparent irreconcilability with ***Ford***.

First, in ***Hill***, after filing an appeal from the denial of Hill's PCRA petition, Hill's counsel failed to file a timely Rule 1925(b) statement. ***Hill***, 16 A.3d at 416. Curiously, it was the Commonwealth that argued on appeal that Hill's PCRA/appellate counsel's failure to file a timely Rule 1925(b) statement amounted to *per se* ineffectiveness. ***Id.*** at 416-17. Despite the fact that Hill herself did not raise this issue, the Supreme Court remarked in a footnote that even had she done so, "such a claim would not be cognizable in this collateral direct appeal under recent decisions of this Court." ***Id.*** at 497 n.17 (citing ***Colavita***, 993 A.2d at 893 n.12; ***Pitts***, 981 A.2d at 880 n.4). [7]

In ***Jette***, the Supreme Court addressed the propriety of this Court's "***Battle*** procedure" for the handling of *pro se* pleadings filed by a represented appellant.[8] In rejecting this procedure, the Supreme Court

[7] Very recently, in ***In re L.J.***, 79 A.3d 1073 (Pa. 2013), our Supreme Court concluded that a footnoted passage in a case by this Court was not precedential for several reasons, including that "the issue was not litigated by the parties" but, instead, our Court had "simply volunteered the discussion." ***Id.*** at 1081. The same is true of the footnote in ***Hill***. The Court acknowledged that Hill had not raised the issue of PCRA counsel's ineffectiveness but, nevertheless, *volunteered* the comment that even if she had, "such a claim would not be cognizable" under ***Colavita*** and ***Pitts***. ***Hill***, 16 A.3d at 497 n.17.

[8] ***See Commonwealth v. Battle***, 879 A.2d 266, 268-69 (Pa. Super. 2005) (holding that when a represented appellant files a *pro se* pleading, brief or motion, we forward the document to counsel who is then required to petition this Court for remand, citing the appellant's allegations of ineffectiveness and providing an evaluation of the claims, after which our Court determines if remand for the appointment of new counsel is appropriate).

found that "address[ing] *pro se* claims of appellate counsel ineffectiveness, while that counsel is still representing the appellant, is in contravention of this Court's long-standing policy that precludes hybrid representation." ***Jette***, 23 A.3d at 1036. Thus, the ***Jette*** Court held that appellate courts cannot consider an appellant's *pro se* assertions of ineffectiveness while the appellant is still represented by counsel. ***Id.*** at 1037-40. Instead, the Court directed that "the proper response to any *pro se* pleading is to refer the pleading to counsel, and to take no further action on the *pro se* pleading unless counsel forwards a motion." ***Id.*** at 1044.

In a footnote at the end of its decision, the ***Jette*** Court acknowledged the appellant's argument that the Court should assess his *pro se* motion, which alleged claims of PCRA counsel's ineffectiveness, "given [the PCRA's] serial petition and time-bar restrictions." ***Id.*** at 1044 n.14. The Court found this argument "contrary to [its] recent jurisprudence," citing the footnotes in ***Colavita*** and ***Pitts***. ***Id.*** It further explained that "whatever difficulty exists in presenting claims of ineffectiveness of PCRA counsel, it provides insufficient justification for abandoning our long-standing prohibition of hybrid representation." ***Id.***

In sum, it is apparent that in ***Hill***, the issue of the appellant's ability to challenge her PCRA counsel's stewardship for the first time on appeal was not before the Court, as she had not asserted such a claim. Moreover, while this issue was admittedly related to the appellant's claims in ***Jette***, the

footnote in that case was not essential to the Court's decision that the "***Battle***" procedure contravened the well-established prohibition against hybrid representation. Accordingly, I view the footnotes in both ***Hill*** and ***Jette*** as merely repeating the *dicta* of ***Pitts*** and its progeny. I do not believe that either footnote constitutes binding authority compelling this Court's contradictory decisions in ***Burkett*** and ***Ford***. Therefore, this *en banc* panel should overrule ***Ford*** not only because it is inconsistent with our decision in ***Burkett***, but, more importantly, because ***Ford*** is premised upon the panel's erroneous conclusion that the footnotes in ***Pitts***, ***Colavita***, and ***Jette*** constitute binding authority.[9] Following ***Burkett***, which has a similar procedural posture to the instant case, I would review the three claims of PCRA counsel's ineffectiveness that Appellant raises herein.

Finally, I appreciate the Majority's recognition "that failing to address PCRA counsel ineffectiveness claims raised for the first time on appeal renders any effective enforcement of the rule-based right to effective PCRA counsel difficult at the state level." Majority Opinion at 29 (citation omitted). However, I emphasize that in this case, failing to address Appellant's ineffectiveness claims does not merely make it *difficult* for him to raise them at the state level - it makes it *impossible*. Appellant's judgment of sentence became final on or about November 24, 2008. Consequently, he cannot file

[9] ***See Commonwealth v. Morris***, 958 A.2d 569, 581 n.2 (Pa. Super. 2008) ("It is well-settled that this Court, sitting *en banc*, may overrule the decision of a three-judge panel of this Court.") (citation omitted).

a timely second PCRA petition asserting his PCRA counsel ineffectiveness claims. Appellant will also be unable to satisfy any exception to the PCRA's one-year time bar by raising such issues. ***See Commonwealth v. Morris***, 822 A.2d 684, 694-95 (Pa. 2003) (stating that claims of PCRA counsel's ineffectiveness do not save an otherwise untimely PCRA petition). Thus, Appellant will serve the remainder of his life in prison with no state-level opportunity to challenge his PCRA counsel's decision not to raise (or present any evidence to support) the very same claim on which Appellant's co-defendant, Jared Lischner, obtained relief and is now serving a sentence of 10 to 20 years. Such inequity demands relief, at least in the form of reviewing Appellant's claims herein. Accordingly, I respectfully dissent.