

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

BRIAN BUSLER SR.

Appellant

No. 2146 EDA 2012

Appeal from the PCRA Order July 6, 2012  
In the Court of Common Pleas of Bucks County  
Criminal Division at No(s): CP-09-CR-0001606-2010

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

**FILED MAY 23, 2013**

Brian Busler, Sr. appeals from the order, entered in the Court of Common Pleas of Bucks County, dismissing his petition brought pursuant to the Post-Conviction Relief Act ("PCRA").<sup>1</sup> After careful review, we affirm.

On May 24, 2010, Busler pled guilty to aggravated indecent assault, attempted aggravated indecent assault, indecent assault, endangering the welfare of children, and corruption of minors. On December 14, 2010, the court sentenced Busler to 5 to 10 years of incarceration for aggravated indecent assault, and 2 to 7 years of incarceration for endangering the

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<sup>1</sup> 42 Pa.C.S.A. §§ 9541-46.

welfare of a child, to be served consecutively.<sup>2</sup> Busler filed neither post-sentence motions nor a direct appeal.

Busler's judgment of sentence became final, for purposes of the PCRA, on January 13, 2011, the date by which he had to file a direct appeal with this Court. **See** 42 Pa.C.S.A. § 9545(b)(3); Pa.R.A.P. 903(a). Accordingly, Busler had one year, or until January 13, 2012, to file his PCRA petition with the trial court. **See** 42 Pa.C.S.A. § 9545(b)(3).

On January 17, 2012, the court entered on the docket Busler's *pro se* PCRA petition, in which he raised trial counsel's ineffectiveness for failing to file a motion to modify sentence. The court appointed PCRA counsel for Busler on March 16, 2012,<sup>3</sup> and held a hearing on July 2, 2012. Busler testified on his own behalf and the Commonwealth called Busler's trial counsel, Robert Katzenstein, Esquire, as its sole witness. Busler testified that he wanted to present medical evidence documenting his history of Type 1 Diabetes and associated seizures and comas. N.T. PCRA Hearing,

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<sup>2</sup> The court determined that the remaining charges merged with the aggravated indecent assault charge for purposes of sentencing.

<sup>3</sup> Court-appointed counsel did not file an amended PCRA petition. This Court has found that failure of appointed PCRA counsel to file an amended petition may constitute deprivation of "the opportunity of legally trained counsel to advance his position in acceptable legal terms." **Commonwealth v. Hampton**, 718 A.2d 1250, 1254 (Pa. Super. 1998) (internal citations removed). **Hampton** may be distinguished from the facts of this case as the language of Busler's *pro se* petition set forth a valid and coherent legal issue for our review, and Busler reiterated at the PCRA hearing that this was the one issue he wished to raise. N.T. PCRA Hearing, 7/2/2012, at 20-21.

7/2/2012, at 15-20. Busler also wanted to present testimony regarding his employment history and contributions he had made to the community. **Id.**

The Commonwealth asserted that Busler's petition was untimely, because it was filed four days beyond the January 13, 2012 deadline. The court rejected this argument, finding that the prisoner mailbox rule applied.<sup>4</sup> PCRA Order, 7/6/2012; **see Commonwealth v. Little**, 716 A.2d 1287, 1288 (Pa. Super. 1998) (under prisoner mailbox rule delivery date of PCRA petition by defendant to proper prison authority constitutes filing date). The PCRA court dismissed the petition, and Busler timely appealed.

Busler raises the following issue for our review: "Did the trial court err by dismissing the petition for post-conviction collateral relief for reinstatement of post-sentence rights where appellant testified he timely requested a reconsideration of sentence which was never filed?" Appellant's Brief, at 4.<sup>5</sup>

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<sup>4</sup> A cash slip in the record indicates Busler paid for postage on January 12, 2012, and the postage meter stamp on the envelope indicates that the petition was mailed on January 13, 2012.

<sup>5</sup> In his Pa.R.A.P. 1925(b) Statement, Busler requests restoration of both his post-sentence rights and his appellate rights. However, in his *pro se* PCRA petition and in his Appellate Brief, Busler only raised the issue of restoring his post-sentence motion rights. Additionally, during the PCRA hearing the court asked Busler: "[J]ust to be clear . . . the only thing you're asking this Court to do is reinstate your post-sentence rights so you can file the reconsideration at this time, correct?" N.T. PCRA Hearing, 7/2/2012, at 20-21. Busler answered in the affirmative. **Id.** at 21. As Busler did not raise the restoration of his appellate rights before the PCRA court, we may not (*Footnote Continued Next Page*)

This Court has held:

Our standard of review of a PCRA court's dismissal of a PCRA petition is limited to examining whether the PCRA court's determination is supported by the evidence of record and free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.

***Commonwealth v. Sampson***, 900 A.2d 887, 889-90 (Pa. Super. 2006)

(internal citations omitted).

Our case law on restoration of post-sentence rights is sparse, however this Court has determined that the PCRA may be a vehicle used to restore post-sentence rights, because the restoration of post-sentence rights is analogous to the restoration of lost appellate rights. ***Commonwealth v. Grafton***, 928 A.2d 1112, 1114-15 (Pa. Super. 2007). The ***Grafton*** Court opined:

While we have not found any cases wherein post-sentence rights were restored under the PCRA, we note that ***Commonwealth v. Wright***, 846 A.2d 730 (Pa. Super. 2004), seemingly acknowledges the court's authority to grant this relief under the PCRA. Moreover, PCRA courts routinely restore lost appellate rights. Looking at the matter analogously, we see no significant distinction between the restoration of lost appellate rights and the restoration of lost post-sentence rights. That is, if a defendant has been deprived of his post-sentence rights through an omission of counsel or the court, the defendant should be able to redress that deprivation under the PCRA."

***Grafton, supra*** at 1114-15.

(Footnote Continued) \_\_\_\_\_

consider it on appeal. Pa.R.A.P. 302(a); ***see Commonwealth v. Paddy***, 15 A.3d 431, 465 n.20 (Pa. 2011).

The U.S. Supreme Court's reasoning in **Roe v. Flores-Ortega**, 528 U.S. 470 (2000), also supports this conclusion. The Supreme Court wrote that the harm inflicted on a defendant by counsel's failure to consult constituted a "serious denial of the entire judicial proceeding itself." **Id.** at 483. We find that denying a defendant the opportunity to pursue post-sentence motions and have a hearing to consider those motions is also the denial of a judicial proceeding and accordingly, our restoration of appellate rights jurisprudence is directly applicable to this case.

Where a defendant clearly asks for a direct appeal and counsel fails to file one, a presumption of prejudice arises regardless of the merits of the underlying issues. **Commonwealth v. Lantzy**, 736 A.2d 564 (Pa. 1999). Even where a defendant has not clearly articulated his desire to appeal, counsel may still owe that defendant a duty to consult regarding a potential appeal, requiring reinstatement of appellate rights. **Commonwealth v. Touw**, 781 A.2d 1250 (Pa. Super. 2001).

In **Touw**, this Court applied the holding of **Flores-Ortega**, in which the U.S. Supreme Court addressed the question of whether "counsel [is] deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes [regarding an appeal] one way or the other[.]" **Flores-Ortega**, 528 U.S. at 477. In answering this question, the U.S. Supreme Court applied the two-pronged framework established under **Strickland v. Washington**, 466 U.S. 668 (1984), which requires that a defendant asserting a claim of ineffective assistance of counsel must show: (1)

counsel's representation fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant. **Id.** at 688, 694.

With regard to the first **Strickland** prong, the **Flores-Ortega** Court declined to set a bright-line rule, but concluded counsel has a constitutionally imposed duty to consult with his client about an appeal when there is reason to think either a rational defendant would want to appeal or this particular defendant reasonably demonstrated to counsel that he was interested in appealing. **Flores-Ortega**, 528 U.S. at 480. The Court defined the term "consult" to mean "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." **Id.** at 478.

In line with the second prong of **Strickland**, the **Flores-Ortega** Court held that once a defendant establishes that counsel had a constitutionally imposed duty to consult, but failed to do so, he must also show that prejudice resulted from such failure. **Id.** at 481. In order to do so, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." **Id.** The question whether a given defendant made the requisite showing of prejudice will turn on the facts of a particular case. **Id.** at 485.

Instantly, Busler testified at the PCRA hearing that he sent multiple letters to Attorney Katzenstein after sentencing requesting he file post-

sentence motions. Katzenstein, however, testified at the PCRA hearing that he had received no such communication. N.T. PCRA Hearing, 7/2/2012, at 26-28, 58, 68. In this case, the relevant evidence was limited to the testimony of the two witnesses. After hearing the testimony, the trial court “found that defense counsel was credible and [Busler] was not.” Trial Court Opinion, 9/25/2012, at 6. Credibility determinations are within the sound discretion of the PCRA court. ***Commonwealth v. Widgins***, 29 A.3d 816, 820 (Pa. Super. 2011). Because we must accept the PCRA court’s credibility determination, we find that Busler has not shown that he reasonably demonstrated to counsel that he wanted to file post-sentence motions as required by ***Flores-Ortega*** and ***Touw***. ***Flores-Ortega***, 528 U.S. at 480; ***Touw***, 781 A.2d at 1254.

However, even if Busler did not clearly articulate his desire to file post-sentence motions to counsel, we may still find that Attorney Katzenstein owed Busler a duty to consult under the first prong of ***Flores-Ortega*** if we find that there was reason to believe that Busler, as a rational defendant, would want to file a post-sentence motion. This Court has explained this requirement, again in the reinstatement of appellate rights context:

Where no request [to file an appeal] has been made, an appellant must establish that a duty to consult was owed. Under ***Roe [v. Flores-Ortega]*** and ***Touw***, an appellant may establish a duty to consult by indicating issues that had any potential merit for further review. This does not require appellant to demonstrate that the Supreme Court would likely grant review to a petition for allowance of appeal, but only that **appellant must show that any issue rises above frivolity.**

**Commonwealth v. Bath**, 907 A.2d 619, 623-24 (Pa. Super. 2006) (emphasis added).

Here, the PCRA court considered whether there was evidence on the record showing that Busler explicitly requested Attorney Katzenstein file a post-sentence motion, but failed to address Attorney Katzenstein's potential duty to consult with Busler about such a course of action. Under **Flores-Ortega/Strickland** and **Touw**, the correct inquiry is whether Busler was prejudiced through counsel's failure to consult with him, effectively depriving him of a judicial proceeding, and thus the PCRA court has erred. **See Bath**, 907 A.2d at 624; **Flores-Ortega**, 528 U.S. at 483.

However, we find the error to be harmless. Busler's proposed motion for reconsideration did not challenge the legality of the sentence, but rather was addressed to the discretionary power of the sentencing judge to reduce the sentence. In this case, the PCRA judge was the same judge at trial and at sentencing, and he has clearly indicated that the evidence Busler intended to present would not have convinced him to alter his sentence. PCRA Court Opinion, 9/28/2012, at 8. Therefore, while the analysis of the PCRA court was flawed, in the interests of judicial economy we will allow the court's sentence to stand. **Commonwealth v. Hoch**, 936 A.2d 515 (Pa. Super. 2007) (sentencing is matter vested in sound discretion of sentencing judge which will not be disturbed on appeal absent manifest abuse of discretion; abuse of discretion is not shown merely by error in judgment). We cannot find that remanding this case would have any significant probability of

resulting in a change of Busler's sentence. **See e.g. Commonwealth v. Birdsong**, 24 A.3d 319, 349 (Pa. 2011) (PCRA court decision, if erroneous, was harmless as would not affect outcome).

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambetta", written over a horizontal line.

Prothonotary

Date: 5/23/2013