## NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT OF PENNSYLVANIA

Appellee

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MICHAEL KERAK,

Appellant No. 2579 EDA 2015

Appeal from the Order entered July 14, 2015 in the Court of Common Pleas of Lehigh County Criminal Division, at No(s): CP-39-CR-0001091-2012

BEFORE: PANELLA, J., OTT, J., and FITZGERALD\*, J.

JUDGMENT ORDER BY PANELLA, J.

**FILED MAY 02, 2016** 

Michael Kerak ("Appellant") appeals from the order denying Appellant's pro se "Motion for Modification/Reconsideration of Sentence (Nunc Pro Tunc)," and "Motion to Terminate Probation." We reverse and remand with instructions.

On May 14, 2012, Appellant entered a guilty plea to Driving Under the Influence ("DUI"), highest rate of alcohol, second offense. *See* 75 Pa.C.S.A. 3802(c). That same day, the trial court sentenced Appellant to a term of six to twenty-three months of incarceration, and a consecutive three-year probationary term. Appellant filed neither a post-sentence motion nor a direct appeal. On July 7, 2015, Appellant filed the motions at issue. The trial

<sup>\*</sup> Former Justice specially assigned to the Superior Court.

court denied relief. In doing so, the court treated the *pro se* filings as untimely post-sentence motions, and determined that no extraordinary circumstances existed to permit their filing *nunc pro tunc*.<sup>1</sup> **See** Order, 7/14/15, at 1 n.1. This timely appeal follows.<sup>2</sup>

Within its appellate brief, the Commonwealth aptly concedes that Appellant's *pro se* motions should have been treated as a petition filed pursuant to the Post Conviction Relief ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We agree. *See generally Commonwealth v. Taylor*, 65 A.3d 462 (Pa. Super. 2013). Moreover, as the filing would constitute Appellant's first PCRA petition, and he has *in forma pauperis* status, Appellant is entitled to the appointment of counsel. *See* Pa.R.Crim.P. 904.

Thus, we remand for the appointment of counsel to either file an amended petition on Appellant's behalf or to comply with the requirements to withdraw pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). *See Commonwealth v. Smith*, 818 A.2d 494, 500-01 (Pa. 2003) (concluding that "Rule 904 mandates that an indigent petitioner, whose first PCRA petition appears untimely, is entitled to the assistance of counsel in

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<sup>&</sup>lt;sup>1</sup> Although Appellant filed two separate motions, the trial court dismissed them together.

<sup>&</sup>lt;sup>2</sup> After review, we are satisfied that Appellant's notice of appeal was timely filed. **See generally Commonwealth v. Jones**, 700 A.2d 423 (Pa. 2007).

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order to determine whether any of the exceptions to the [PCRA's] one-year time limitation apply").

Order reversed. Case remanded for proceedings consistent with this judgment order. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Eso

Prothonotary

Date: <u>5/2/2016</u>