

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

NELSON GARCIA-FLORES

Appellant

No. 2048 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-0000144-2011

BEFORE: PANELLA, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J.

FILED MAY 23, 2013

Appellant, Nelson Garcia-Flores, appeals from the order entered July 6, 2012, by the Honorable Jeffrey L. Finley, Court of Common Pleas of Bucks County, which denied his petition filed pursuant to the Post Conviction Relief Act (PCRA).¹ Additionally, Garcia-Flores' court-appointed counsel, Stuart Wilder, Esquire, has petitioned to withdraw and has submitted a **Turner/Finley**² "no-merit" letter in support thereof contending that Garcia-Flores' appeal is frivolous. After careful review, we grant counsel's petition to withdraw and affirm the denial of Garcia-Flores' PCRA petition.

* Retired Senior Judge assigned to the Superior Court.

¹ 42 PA.CON.S.TAT.ANN. §§ 9541-9546.

² **Commonwealth v. Turner**, 518 Pa. 491, 544 A.2d 927 (1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa.Super. 1988).

On March 10, 2011, Garcia-Flores entered a negotiated guilty plea to 33 counts of burglary, 33 counts of criminal trespass, 33 counts of theft by unlawful taking, 33 counts of receiving stolen property, one count of criminal attempt and one count of loitering. Thereafter, Garcia-Flores was sentenced pursuant to the agreement to a term of 5 to 10 years' incarceration. The trial court determined Garcia-Flores was RRRI eligible and reduced his sentence to 50 months' incarceration. Restitution was ordered at \$82,330.

On October 11, 2011, Garcia-Flores filed a *pro se* PCRA petition. Thereafter, the PCRA court appointed counsel, and an amended petition was filed on April 2, 2012. Following a hearing, the PCRA court dismissed Garcia-Flores' petition on July 6, 2012. This timely appeal followed.

We will first address counsel's motion to withdraw. Our Supreme Court has recently summarized the procedure for withdrawal of court-appointed counsel in collateral attacks on criminal convictions as follows:

Independent review of the record by competent counsel is required before withdrawal is permitted. Such independent review requires proof of:

- 1) A "no-merit" letter by PCRA counsel detailing the nature and extent of his [or her] review;
- 2) A "no-merit" letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
- 3) The PCRA counsel's "explanation", in the "no-merit" letter, of why the petitioner's issues were meritless;
- 4) The PCRA court conducting its own independent review of the record; and
- 5) The PCRA court agreeing with counsel that the petition was meritless.

Commonwealth v. Pitts, 981 A.2d 875, 876 n.1 (Pa. 2009) (citations omitted). Counsel in this case has complied with the mandates of **Turner** and **Finley**, as summarized in **Pitts, supra**. Thus, we must determine whether we agree with counsel's assessment of Garcia-Flores' claim.

Our standard of review of a PCRA court's denial of a petition for post-conviction relief is well-settled: We must examine whether the record supports the PCRA court's determination and whether the PCRA court's determination is free of legal error. **See Commonwealth v. Hall**, 867 A.2d 619, 628 (Pa. Super. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. **See Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001). Our scope of review is limited by the parameters of the PCRA. **See Commonwealth v. Heilman**, 867 A.2d 542, 544 (Pa. Super. 2005).

On April 2, 2012, Attorney Wilder amended Garcia-Flores' *pro se* PCRA petition to assert the claim that Garcia-Flores' guilty plea was not knowingly, intelligently, or voluntarily entered. **See** Motion to Amend Defendant's PCRA Petition, 4/2/12. At the July 2, 2012, PCRA hearing, however, Garcia-Flores indicated that he did not wish to challenge his guilty plea, but instead orally amended his PCRA petition to seek a reduction of the sentence imposed pursuant to the negotiated plea agreement. N.T., PCRA Hearing, 7/2/12 at 7.

Garcia-Flores' claim seeking reconsideration of his sentence is both waived and not cognizable under the PCRA because it could have been raised on direct appeal. **See** 42 PA.CON.S.STAT.ANN. § 9543(a)(3); 42 PA.CON.S.STAT.ANN. § 9544(b). Although a motion for modification of sentence was filed on July 27, 2011, it was filed long after ten days from the imposition of sentence imposed following a revocation within which Pa.R.Crim.P. 708(E) requires a defendant to file a post-sentence motion in order to preserve a challenge to the discretionary aspects of his sentence. Therefore, the trial court was prohibited from entertaining this belated claim.

Accordingly, because our review of the record supports the PCRA court's determination that the issue raised in Garcia-Flores' PCRA petition was meritless, we affirm the order dismissing the PCRA petition and grant PCRA counsel's petition to withdraw.

Petition to withdraw granted. Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 5/23/2013

