

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ANGELO ANTHONY SALERNO, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1916 MDA 2012

Appeal from the Order Entered September 13, 2012
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-0004746-2006

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.:

FILED MAY 20, 2013

Appellant, Angelo Anthony Salerno, Jr., appeals from September 13, 2012 order dismissing his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Additionally, PCRA counsel has requested leave to withdraw in accordance with ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), and their progeny. After

* Retired Senior Judge assigned to the Superior Court.

careful review, we affirm the PCRA court's order and grant counsel's petition to withdraw.¹

The relevant facts and procedural history, as set forth by a prior panel of this Court, are as follows.

According to the affidavit of probable cause accompanying the criminal complaint filed in the present case, on November 18, 2006, [A]ppellant was attending a party hosted by the parents of the 10-year-old female victim, P.S. Appellant was friends with the victim's parents and had known the parents for many years. Appellant was in the basement and went to the second floor of the residence, ostensibly to use the bathroom. Appellant then entered P.S.'s bedroom and approached her bed, where P.S. was lying. Although P.S. was awake, she pretended to be asleep when [A]ppellant entered the room. Appellant then slid his hand down P.S.'s pants and fondled her genital region, then slid his hand under P.S.'s shirt and began to fondle her breasts. P.S. then began to stir in the bed as if she was being awoken by the fondling. This caused [A]ppellant to stop the fondling and leave the bedroom. A short time later, P.S.'s mother entered the bedroom at which time P.S. told her mother what had occurred. Police were summoned shortly thereafter, and [A]ppellant was charged that same day with a variety of sexual offenses.

After being charged, [A]ppellant entered a plea of guilty as to the above-enumerated offenses on January 31, 2007. As required by law, the [trial] court ordered an assessment be conducted by the Sexual Offenders Assessment Board ("SOAB") ...

¹ In lieu of a formal brief, the Commonwealth has filed a letter stating it agrees with the PCRA court "that any appeal from the denial of Appellant's PCRA petition is frivolous." Commonwealth's Letter in lieu of Brief, 2/25/13.

...

A hearing was subsequently held on May 25, 2007 to determine [A]ppellant's status under Megan's Law, 42 Pa.C.S.A. §§ 9791-9799, and to impose sentence. Testifying at that hearing was Paula Brust, a licensed counselor who holds a Master's Degree in Clinical Psychology and who was employed by the SOAB and who conducted the SOAB assessment of [A]ppellant and also authored the SOAB report. Upon Ms. Brust's recommendation, the [trial] court found [A]ppellant to be an SVP, as that term is used in Megan's Law, and thus subject to lifetime registration requirements. A sentence of 12 to 60 months' incarceration followed by 5 years' probation was also imposed. On May 31, 2007, [A]ppellant filed a post-sentence motion to modify sentence, which was denied on June 7, 2007. Appellant failed to take a direct appeal but, on February 19, 2008, did file a PCRA petition seeking the restoration of his appellate rights. On September 18, 2008, [A]ppellant's direct appeal rights were reinstated. Appellant followed action by filing a timely notice of appeal on October 2, 2008[.]

Commonwealth v. Salerno, 13 A.3d 988 (Pa. Super. 2010) (unpublished memorandum at 1-2, 4-5) (footnotes omitted), *appeal denied*, 20 A.3d 486 (Pa. 2011). On direct appeal, Appellant challenged the sufficiency of the evidence to support the trial court's determination that he is an SVP, which this Court affirmed, and on May 16, 2011, our Supreme Court denied Appellant's petition for allowance of appeal. ***Id.***

Subsequently, on March 5, 2012, Appellant filed a timely *pro se* PCRA petition, again challenging the designation of his status as an SVP. On March 16, 2012, Jeffrey Yelen, Esquire (Attorney Yelen), was appointed to represent Appellant. Thereafter, on April 25, 2012, the PCRA court filed

notice of its intention to dismiss Appellant's PCRA petition pursuant to Pa.R.Crim.P. 907. Appellant subsequently requested substitute counsel be appointed, and an extension of time in which to file a response to the PCRA court's Rule 907 notice. Matthew Kelly, Esquire (Attorney Kelly) was appointed as replacement counsel, and on June 21, 2012, the PCRA court granted Appellant an additional 45 days to respond to its Rule 907 notice.² Thereafter, on September 13, 2012, the PCRA court denied Appellant's PCRA petition. On October 11, 2012, Appellant filed a timely notice of appeal.³

On appeal, Appellant raises the following issue for our review.

Whether the [t]rial [c]ourt erred in finding Appellant to be a Sexually Violent Predator[?]

Turner/Finley Brief at 1.

"Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the

² A review of the certified record indicates Appellant did not file a response to the PCRA court's Rule 907 notice.

³ The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). In lieu of a Rule 1925(a) opinion, the PCRA court has adopted the reasoning set forth in its April 25, 2012 notice of intent to dismiss pursuant to Rule 907.

PCRA court level.” **Id.** “The PCRA court’s credibility determinations, when supported by the record, are binding on this Court.” **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). “However, this Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” **Id.**

Prior to considering Appellant’s arguments, we must first review Attorney Kelly’s request to withdraw from representation. As delineated by our Supreme Court, the requirements counsel must adhere to when requesting to withdraw include the following.

- 1) A “no-merit” letter by PC[R]A counsel detailing the nature and extent of his review;
- 2) The “no-merit” letter by PC[R]A counsel listing each issue the petitioner wished to have reviewed;
- 3) The PC[R]A counsel’s “explanation”, in the “no-merit” letter, of why the petitioner’s issues were meritless[.]

Commonwealth v. Pitts, 981 A.2d 875, 876 (Pa. 2009), quoting **Finley, supra** at 215. “Counsel must also send to the petitioner: (1) a copy of the “no-merit” letter/brief; (2) a copy of counsel’s petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.” **Commonwealth v. Wrecks**, 931 A.2d 717, 721 (Pa. Super. 2007).

[W]here counsel submits a petition and no-merit letter that do satisfy the technical demands of **Turner/Finley**, the court - trial court or this Court - must then conduct its own review of the merits of

the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief. By contrast, if the claims appear to have merit, the court will deny counsel's request and grant relief, or at least instruct counsel to file an advocate's brief.

Id. (citation omitted).

Instantly, we determine that Attorney Kelly has complied with the requirements of ***Turner/Finley***. Specifically, Attorney Kelly's ***Turner/Finley*** no-merit brief details the nature and extent of his review, addresses Appellant's claim raised in his PCRA petition challenging his designation as an SVP, and determines that the issues lack merit. Attorney Kelly provides a discussion of Appellant's claim, explaining why the issue is without merit. Additionally, Attorney Kelly served Appellant with a copy of the petition to withdraw and no-merit brief, advising Appellant that, if counsel was permitted to withdraw, Appellant had the right to proceed *pro se* or with privately retained counsel. Appellant has not filed any response. We therefore proceed to conduct an independent merits review of Appellant's claims.

Appellant raises the same issue in his PCRA petition as he challenged on direct appeal, specifically that the trial court erred in determining he was an SVP. This Court was faced with a similar circumstance in ***Commonwealth v. Price***, 876 A.2d 988 (Pa. Super. 2005), *appeal denied*, 897 A.2d 1184 (Pa. 2006), *cert. denied*, ***Price v. Pennsylvania***, 549 U.S.

902, (2006). In affirming the dismissal of Appellant's PCRA petition, the **Price** Court held the following.

Generally, an appellant may not raise allegations of error in an appeal from the denial of PCRA relief as if he were presenting the claims on direct appeal. **Commonwealth v. Brown**, 582 Pa. 461, 872 A.2d 1139, 1146-48 (2005) (stating claims available on direct appeal are waived for purposes of PCRA review and this waiver cannot be overcome, absent full layered ineffectiveness of counsel analysis).

Instantly, [the a]ppellant presents his claim to us on appeal as if on direct appeal, and without any ineffectiveness of counsel analysis. Further, [the a]ppellant does not claim a constitutional violation, an unlawfully induced guilty plea, the improper obstruction of the right to appeal, the existence of after-discovered exculpatory evidence, the imposition of a sentence greater than the lawful maximum, or a proceeding in a tribunal without jurisdiction. **See id.**; 42 Pa.C.S.A. § 9543(a)(2)(i)-(viii). Instead, [the a]ppellant directly challenges the sufficiency of the evidence to support his SVP classification and seeks removal of the collateral consequences of his guilty plea conviction under Megan's Law II. **See Williams, supra; Benner, supra; Leidig, supra.** Therefore, [the a]ppellant's [] issue as presented is not a cognizable claim under the PCRA. **See id.**

Id. at 995. Accordingly, the **Price** Court affirmed the PCRA court's denial of relief. **Id.** at 996. We conclude that **Price** is dispositive in the instant matter as Appellant solely challenges his SVP status, and has failed to raise any other cognizable PCRA claim for our review.

Furthermore, it is well established that an appellant cannot raise a claim that has “been previously litigated in his prior direct appeal to this court.” **Commonwealth v. Hutchins**, 760 A.2d 50, 55 (Pa. Super. 2000).

A claim previously litigated in a direct appeal is not cognizable under the PCRA. 42 Pa.C.S.A. § 9544(a)(2); **Commonwealth v. Chester**, 557 Pa. 358, 379–380, 733 A.2d 1242, 1253 (1999). **Commonwealth v. Miller**, 560 Pa. 500, 512, 746 A.2d 592, 598 (2000). The mere fact that [an a]ppellant is now advancing new arguments in support of these previously litigated issues is of no avail. A PCRA Petitioner cannot obtain PCRA review of previously litigated claims decided adversely to him in his direct appeal simply by presenting those claims again in a PCRA Petition and setting forth new theories of relief in support thereof. **Commonwealth v. Morales**, 549 Pa. 400, 410, 701 A.2d 516, 521 (1997). “The purpose of the PCRA is not to provide a defendant with a means of relitigating the merits of issues long since decided on direct appeal.” **Commonwealth v. Henry**, 550 Pa. 346, 365, 706 A.2d 313, 322 (1997), quoting **Commonwealth v. Buehl**, 540 Pa. 493, 500, 658 A.2d 771, 775 (1995).

Id.

Based on the foregoing, we conclude the PCRA court properly dismissed Appellant’s PCRA petition. Accordingly, we affirm the PCRA court’s September 13, 2012 order and grant counsel’s petition to withdraw.

Order affirmed. Petition to withdraw as counsel granted.

J-S25018-13

Judgment Entered.

Mary A. Graybill
Deputy Prothonotary

Date: 5/20/2013