

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

FODAY PHILIP KANU

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1872 EDA 2012

Appeal from the PCRA Order June 12, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0007021-2010

BEFORE: DONOHUE, J., MUNDY, J., and OLSON, J.

MEMORANDUM BY MUNDY, J.:

FILED MAY 23, 2013

Appellant, Foday Philip Kanu, appeals from the June 12, 2012 order dismissing his first petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we vacate and remand with instructions.

We summarize the relevant facts and procedural history of this case as follows. On May 6, 2011, Appellant pled guilty to one count of criminal solicitation to commit first-degree murder.¹ That same day, the trial court imposed a sentence of five to ten years' imprisonment to be served consecutively to the sentence of 16 to 32 years' imprisonment that Appellant

¹ 18 Pa.C.S.A. § 902(a) (to commit 18 Pa.C.S.A. § 2502(a)).

was already serving. Appellant did not file a post sentence motion or a direct appeal.

On March 5, 2012, Appellant filed a timely *pro se* PCRA petition. The PCRA court appointed Sean E. Cullen, Esquire (Attorney Cullen) to represent Appellant. The certified record contains a no-merit letter authored by Attorney Cullen 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. While said letter is dated April 20, 2012, it was neither time-stamped, nor docketed. Additionally, although this “no merit” letter references a petition by Attorney Cullen to withdraw from representation, no such petition was ever filed or docketed in the PCRA court. The PCRA court notified Appellant of its intention to dismiss his PCRA petition without a hearing on May 1, 2012, pursuant to Pennsylvania Rule of Criminal Procedure 907, on the basis of Attorney Cullen’s no-merit letter, as well as its independent review of the record. The PCRA court’s Rule 907 notice did not mention any pending petition to withdraw filed by Attorney Cullen. Appellant filed a *pro se* response to said notice on May 21, 2012.²

² Although Appellant’s Rule 907 response is time-stamped May 24, 2012, we note that the certified record contains a copy of the envelope Appellant used for mailing, which shows a postmark of May 21, 2012. Under the prisoner mailbox rule, “a *pro se* prisoner’s document is deemed filed on the date he delivers it to prison authorities for mailing.” ***Commonwealth v. Chambers***, 35 A.3d 34, 38 (Pa. Super. 2011) (citation omitted), *appeal* (Footnote Continued Next Page)

On June 12, 2012, the PCRA court entered an order denying Appellant's response to its Rule 907 notice as untimely and dismissing Appellant's PCRA petition.³ On July 6, 2012, Appellant filed a timely *pro se* notice of appeal. On November 23, 2012, the PCRA court entered an order *sua sponte* releasing Attorney Cullen as counsel of record.

It is axiomatic that "a criminal defendant has a right to representation of counsel for purposes of litigating a first PCRA petition through the entire appellate process." ***Commonwealth v. Robinson***, 970 A.2d 455, 457 (Pa. Super. 2009) (*en banc*). "[W]here [a] ... first-time PCRA petitioner was denied his right to counsel ... this Court is required to raise this error *sua sponte* and remand for the PCRA court to correct that mistake." ***Commonwealth v. Stossel***, 17 A.3d 1286, 1290 (Pa. Super. 2011).

Additionally, once counsel enters his or her appearance on behalf of a defendant, "[c]ounsel ... may not withdraw his or her appearance except by leave of court." Pa.R.Crim.P. 120(B)(1). Rule 120 also requires a petition to withdraw to be "filed with the clerk of courts, and a copy concurrently served on the attorney for the Commonwealth and the defendant; or ... made orally

(Footnote Continued) _____

denied, 46 A.3d 715 (Pa. 2012). As a result, we deem Appellant's Rule 907 response filed on May 21, 2012, and therefore timely.

³ In its Rule 1925(a) opinion, the PCRA court acknowledges that Appellant's response was timely filed pursuant to the prisoner mailbox rule. PCRA Court Opinion, 9/10/12, at 11.

on the record in open court in the presence of the defendant.” ***Id.*** at 120(B)(2). The comment to Rule 120 further states, “[u]nder paragraph (B)(2), counsel **must file a motion to withdraw in all cases**, and counsel’s obligation to represent the defendant, whether as retained or appointed counsel, remains until leave to withdraw is granted by the court.” ***Id.*** at 120 *cmt.* (emphasis added); ***accord Commonwealth v. Champney***, 783 A.2d 837, 840-841 (Pa. Super. 2001).

As stated above, although Attorney Cullen did author a comprehensive “no-merit” letter, Attorney Cullen never actually filed a petition to withdraw as counsel. Nor did Attorney Cullen make an oral motion to withdraw on the record in Appellant’s presence. However, Appellant, most likely believing that he had to proceed *pro se*, filed his *pro se* notice of appeal on July 6, 2012. The PCRA court eventually entered an order releasing Attorney Cullen from representation on November 23, 2012, 146 days after Appellant filed his *pro se* notice of appeal. It is well settled that a trial court is generally divested of jurisdiction over a case once a notice of appeal has been filed. **See** Pa.R.A.P. 1701(a) (stating, “after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter[.]”); 42 Pa.C.S.A. § 5505 (stating “[e]xcept as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from

such order has been taken or allowed[.]"). Therefore, the PCRA court's November 23, 2012 order releasing Attorney Cullen as counsel of record was a nullity and Attorney Cullen is still counsel of record. The record reflects that Appellant acted diligently in preserving his rights to appellate review by filing a timely *pro se* notice of appeal and a timely *pro se* Rule 1925(b) statement. Although Appellant was still technically represented by counsel, the trial court continued to accept *pro se* filings from Appellant. However, the record also reveals that Attorney Cullen was served with the PCRA court's June 12, 2012 dismissal order and its July 10, 2012 Rule 1925(b) order by certified mail. There is also a handwritten designation on Appellant's July 6, 2012 *pro se* notice of appeal noting Attorney Cullen as counsel of record. Furthermore, in his *pro se* appellate brief, Appellant now alleges that Attorney Cullen rendered ineffective assistance during the PCRA proceedings below. **See** Appellant's Brief at 6.

Given the irregular state of the record, we conclude the best course of action is to vacate the PCRA court's order and remand for further proceedings. On remand, the PCRA court shall conduct a hearing to determine whether Appellant's PCRA petition shall proceed with Attorney Cullen or with new counsel. In the event Appellant expresses the desire to proceed *pro se*, the PCRA court shall conduct an on-the-record colloquy pursuant to Pennsylvania Rule of Criminal Procedure 121(A) and ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998). **See Robinson**,

supra at 459-460 (stating, "if a PCRA defendant indicates a desire to represent himself, it is incumbent upon the PCRA court to elicit information from the defendant that he understands the items outlined in [Rule 121]").

Accordingly, for all the foregoing reasons, the PCRA court's June 12, 2012 order is vacated and the case is remanded for further proceedings, consistent with this memorandum. The Prothonotary is directed to forward a copy of this memorandum to Sean E. Cullen, Esquire, 40 East Main Street, Norristown, Pennsylvania 19401.

Order vacated. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.

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

Prothonotary

Date: 5/23/2013