

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

REYNALDO ADOLFO SUAREZ

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2076 MDA 2013

Appeal from the PCRA Order of October 21, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No.: CP-06-CR-0004549-2009

BEFORE: DONOHUE, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED JULY 28, 2014

Reynaldo Suarez appeals *pro se* the October 21, 2013 order denying his petition for relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. We vacate the PCRA court's order, and remand this case for a hearing pursuant to ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998), at which the PCRA court must determine whether Suarez' decision to proceed without counsel is knowing, intelligent, and voluntary.

On April 22, 2010, following a jury trial, Suarez was convicted of two counts of possession of a controlled substance with intent to deliver

* Retired Senior Judge assigned to the Superior Court.

("PWID"),¹ two counts of possession of a controlled substance,² one count of possession of drug paraphernalia,³ one count of receiving stolen property ("RSP"),⁴ and one count of possession of a firearm with altered manufacturer's number.⁵ On direct appeal, a panel of this Court summarized the facts underlying Suarez' convictions as follows:

[A]t approximately 6:00 a.m. on September 4, 2009, Corporal Matthew T. Tremba of the Pennsylvania State Police (PSP), accompanied by members of the PSP Emergency Response Team (SERT), executed a search warrant at 343 West Green Street, a three-story residence located in the City of Reading. Suarez, along with his wife, Fatimah Suarez, were located in a bedroom on the third floor of the residence. When the police entered the room, Suarez's wife was observed throwing marijuana into the air while Suarez was in the act of attempting to flee through a nearby window. Trooper Tremba ordered Suarez to show his hands after which a standoff ensued between Suarez and Trooper Tremba. Suarez eventually ceded and retreated inside the bedroom.

In close proximity to where Suarez was standing, the police observed an open closet. In plain sight, the troopers observed two guns, a grenade, and a baggie containing cocaine. A search of the closet yielded a television, a jewelry box containing (8) bags of crack cocaine, U.S. currency, as well as three

¹ 35 P.S. § 780-113(a)(30). One count of PWID was based upon Suarez' possession of cocaine. The other count was based upon his possession of marijuana.

² 35 P.S. § 780-113(a)(16). Again, the two counts reflected Suarez' possession of both cocaine and marijuana.

³ 35 P.S. § 780-113(a)(32).

⁴ 18 Pa.C.S. § 3925.

⁵ 18 Pa.C.S. § 6110.2.

ammunition slugs. One of the guns in the closet was fully loaded with ammunition. Additionally, the troopers seized a digital scale and cutting tool, walkie-talkies and 150 baggies of cocaine packaged in a take-out container, from a coffee table in the third floor bedroom where the troopers found Suarez and his wife. A marriage license as well as social security cards belonging to Suarez and his wife were also discovered on the second floor of the residence.

During the execution of the search warrant throughout the remainder of the residence, the police discovered Francisco Santiago lying on the floor on the second story of the residence. A revolver-type firearm, missing its cylinder, was found on the floor approximately one foot from Santiago. The gun was reported stolen less than one week prior to the execution of the search warrant. Additionally, empty baggies were found on a table and on a dresser in the room where Santiago was located. Santiago's identification card was found on the same dresser with the baggies, near a television. A revolver-type handgun was also found in a dresser drawer in the same room as Santiago.

When the police entered the first floor living room of the residence, they observed Salvador Dalmase and Eduardo Mejia, as well as a male juvenile, seated on the floor. Also found in the living room was a baggie of cocaine, which was believed to have fallen from Dalmase's shorts when he stood up. A handgun with an obliterated serial number was also found in the living room. Additionally, 139 bags of cocaine were found near the couch [where] Dalmase and Mejia were seated and Mejia was found to have \$592 in U.S. Currency on his person. The troopers also uncovered a bag containing 100 additional baggies of cocaine on the steps leading from the first to second floors of the residence. Suarez, along with his co-defendants, were subsequently arrested.

Commonwealth v. Suarez, No. 549 MDA 2011, slip op. at 1-4 (Pa. Super. Dec. 2, 2011) (references to notes of testimony omitted).

On June 18, 2010, Suarez was sentenced to an aggregate term of five to ten years' imprisonment. Suarez' counsel did not file a direct appeal on

Suarez' behalf. However, Suarez filed a letter with the trial court asserting that counsel was ineffective for failing to file the direct appeal. The trial court treated the letter as a PCRA petition, and subsequently appointed counsel to represent Suarez. Following an amended PCRA petition, and with the Commonwealth's consent, the trial court reinstated Suarez' rights to file a direct appeal. However, on direct review, a panel of this Court affirmed Suarez' judgment of sentence. **Suarez**, *supra* at 1, 15.

On November 30, 2012, Suarez retained Emily Cherniak, Esquire, as PCRA counsel. Attorney Cherniak filed a timely PCRA petition on Suarez' behalf. On April 3, 2013, the PCRA court conducted a hearing. Following post-hearing supplemental briefing from both parties, the PCRA court dismissed Suarez' PCRA petition by an October 21, 2013 order and a corresponding opinion addressing Suarez' claims.

Although the certified record does not indicate that Attorney Cherniak filed a motion to withdraw as counsel, or that she was ever granted leave to withdraw as counsel, Suarez filed a *pro se* notice of appeal on November 18, 2013. On the same date, Suarez also filed a *pro se* concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On December 3, 2013, the PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a), wherein the court adopted the rationale that it set forth in its October 21, 2013 opinion addressing, and dismissing, Suarez' PCRA claims.

Continuing to represent himself, Suarez has filed a brief with this Court in which he presents the following three issues for our review:

1. Did the PCRA court err in determining that [Suarez] did not have standing to challenge the validity of the search warrant?
2. Did the lower court err in failing to order the Commonwealth to disclose the identity of the confidential informant?
3. Did the lower court err in failing to find trial counsel ineffective for failing to call defense witnesses at trial?

Brief for Suarez at 4.

As indicated above, we do not address the merits of the issues posed and briefed by Suarez, because we have detected a deficiency in the record. Suarez appears before this Court *pro se*. However, there is no indication in the certified record that Suarez ever made a knowing, intelligent, and voluntary waiver of his right to counsel pursuant to **Grazier**. Thus, we are constrained to remand this case for proceedings consistent with the following discussion.

A PCRA petitioner/appellant has a rule-based right to counsel during the proceedings, at all levels, disposing of a first PCRA petition. **Commonwealth v. Figueroa**, 29 A.3d 1177, 1180 n.6 (Pa. Super. 2011); Pa.R.Crim.P. 904. Pursuant to **Grazier**, “[w]hen a waiver of the right to counsel is sought at the post-conviction and appellate stages, an on-the-record determination should be made that the waiver is a knowing, intelligent, and voluntary one.” **Grazier**, 713 A.2d at 82. A **Grazier** hearing is required before we may adjudicate an appeal even when it is clear from the record that a particular appellant “clearly and unequivocally indicates a desire to represent himself,” **Commonwealth v. Robinson**, 970 A.2d 455,

459-60 (Pa. Super. 2009), and even when neither of the parties challenges the lack of a hearing. **See Commonwealth v. Stossel**, 17 A.3d 1286, 1290 (Pa. Super. 2011) (“Thus, we hold that where an indigent, first-time PCRA petitioner was denied his right to counsel—or failed to properly waive that right—this Court is required to raise this error *sua sponte* and remand to the PCRA court to correct that mistake.”).

The record clearly indicates that this is Suarez’ first PCRA petition after his judgment of sentence became final at the conclusion of direct appeal. **See Commonwealth v. Figueroa**, 29 A.3d 1177, 1181 (Pa. Super. 2011). Suarez was represented by counsel that he retained during the PCRA process. However, Suarez filed his notice of appeal and concise statement of errors complained of on appeal *pro se*. There is no indication in the record that counsel sought to withdraw as counsel, that she was granted leave to do so, or that Suarez voluntarily, intelligently, or knowingly elected to proceed without counsel. Even assuming, *arguendo*, that Suarez evinced a clear desire to proceed *pro se*, the PCRA court still was bound to conduct a hearing pursuant to **Grazier** in order to obtain a “knowing, intelligent, and voluntary” waiver of Suarez’ right to counsel.

In light of this unequivocal authority, we are constrained to remand this case for a proper **Grazier** hearing, including a full consideration of the factors set forth at Pa.R.Crim.P. 121(A)(2) (setting forth the relevant considerations for determining whether a criminal litigant is making a knowing, intelligent, and voluntary decision to proceed *pro se*). Notably, in

Robinson, as is the case herein, the PCRA-appellant was represented by counsel during the PCRA proceedings, but chose to proceed *pro se* when it came time to file the notice of appeal. **Robinson**, 970 A.2d at 457. The PCRA court did not conduct a **Grazier** hearing, but permitted counsel to withdraw and allowed the appellant to proceed *pro se*. **Id.** In holding that a **Grazier** hearing is required even when the PCRA-appellant's desire to proceed *pro se* is clear and unequivocal, and where the PCRA-appellant's brief was proper and complete, we noted that:

[w]hen a defendant is representing himself, he lacks legal expertise and may overlook meritorious issues and defenses or pertinent and compelling authority. We, as an appellate court, would not be permitted to examine *sua sponte* any issues not raised before us. It is only after a defendant knowingly, voluntarily, and intelligently relinquishes legal representation that he may be charged with any default resulting from his training.

Id. at 460.

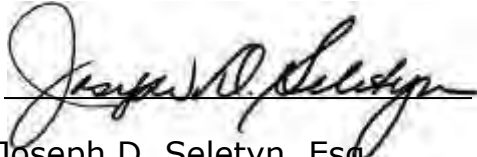
Accordingly, in **Robinson**, we vacated the PCRA order dismissing the PCRA-appellant's PCRA petition, remanded the case for a proper colloquy pursuant to **Grazier** and Pa.R.Crim.P. 121(A)(2), and relinquished our jurisdiction. We must do the same here.

Thus, we vacate the PCRA court's dismissal order, we remand this case for proceedings consistent with the foregoing, and we relinquish our jurisdiction. **See Robinson**, 970 A.2d at 460; **Stossel**, 17 A.3d at 1291.

Order vacated. Case remanded. Jurisdiction relinquished.

J-S35029-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014