NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DAVID L. MAYES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3158 EDA 2012

Appeal from the Judgment of Sentence October 18, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0008461-2004

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Appeal from the Judgment of Sentence October 18, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0007605-2009

BEFORE: BOWES, J., LAZARUS, J., and WECHT, J.

DISSENTING MEMORANDUM BY LAZARUS, J. **FILED JULY 23, 2014**

I respectfully dissent. Even if counsel had filed a proper petition to withdraw, I do not find that Mayes' challenge to his waiver of counsel presents a meritorious issue. Rather, under the circumstances specific to

this case, the trial court did not err in permitting Mayes to proceed *pro se.* To hold otherwise elevates procedure over substance.

My review of the record reveals that the court, acting in an abundance of caution, asked Mayes five different times if he would like a court-appointed attorney and twice insisted on appointing an attorney despite Mayes' protestations. However, Mayes, determined to proceed with his hearing, clearly and unequivocally declined each offer. It is unfortunate that Mayes later regretted his decision to waive counsel, but a court cannot force a defendant to accept court-appointed counsel.

Mayes, like all defendants, was entitled to a fair trial, not a perfect one. ***Lutwak v. United States***, 344 U.S. 604 (1953). Even if the court had performed the required on-the-record oral colloquy, it is unlikely that Mayes would have permitted the court to appoint counsel on his behalf. Mayes very clearly did not want an attorney. What he did want was to proceed with the hearing. Now, the Majority seeks to do the opposite of what Mayes wanted, and its decision to remand for a new VOP hearing will require Mayes to return to court and further extend his time in jail.

While the law may not recognize frustration, exhaustion, or delay as legitimate reasons for waiving one's right to counsel, it is within a judge's province to ascertain whether a defendant's waiver of counsel is knowing, voluntary, and intelligent. Pa.R.Crim.P. 121(C). Judge Coonahan may not have reviewed each element of Pa.R.Crim.P.(A)(2) with Mayes, but she believed, given their lengthy discussion and his defiant rejection of court-

appointed counsel, that Mayes' waiver of counsel was knowing, voluntary, and intelligent.

The tension between what a defendant wants and the procedural requirements of the court can, at times, be difficult to reconcile. However, in this instance, it cannot be said that Judge Coonahan "failed" to appoint counsel for Mayes. In fact, she did everything she possibly could to protect Mayes' right to counsel and persuade him against waiver.

For these reasons, I dissent.