NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
v.	:	
	:	
JAMES LEONARD SMITH II	:	
	:	
Appellant	:	No. 1662 MDA 2025

Appeal from the Judgment of Sentence Entered October 29, 2025
In the Court of Common Pleas of York County
Criminal Division at No: CP-67-CR-0001758-2021

BEFORE: LAZARUS, P.J., STABILE, J., and BENDER, P.J.E.

MEMORANDUM BY STABILE, J.: **FILED: NOVEMBER 12, 2026**

This appeal concerns whether Appellant, James Leonard Smith II, validly waived his right to counsel at a parole violation hearing. In 2024, Appellant pleaded guilty to one count of indecent assault without consent, and he was sentenced to a prison term of three to 23 months. At his postconviction proceedings, Appellant's appointed counsel withdrew, having advised Appellant that he could then proceed *pro se* or retain private counsel. Appellant failed to obtain postconviction relief, and after being granted parole, he was charged with, and found guilty of, violating the conditions of release. However, counsel was not appointed at that latter stage of the case; Appellant was never colloquied as to that right; and he had not previously waived it. To remedy this erroneous deprivation of counsel, we must vacate the judgment of sentence and remand the case so that Appellant may make an informed decision as to whether he will avail himself of that right.

The facts of this case are straightforward. Following Appellant's guilty plea in 2024 to one count of indecent assault, the trial court imposed a prison term of three to 23 months. The end-date of the maximum range fell on June 17, 2026. Parole was later granted and made effective on October 2, 2024.

After Appellant was released on parole, he filed a *pro se* motion to withdraw his guilty plea. The motion was construed as a petition governed by the Post Conviction Relief Act (42 Pa.C.S.A. §§ 9541-9546 (PCRA)), and PCRA counsel was appointed to represent Appellant. Soon thereafter, PCRA counsel determined that there were no meritorious legal claims that could be raised on Appellant's behalf. PCRA counsel moved to withdraw from representation in line with the procedures mandated by ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

In a "no-merit" letter addressed to Appellant, PCRA counsel advised him that, if he were permitted to withdraw, Appellant could "still file a *pro se* appeal to the Superior Court of Pennsylvania or hire a private attorney to do it for [him]." ***See*** PCRA Counsel's No-Merit Letter, 2/10/2025, at 14. The letter said nothing, however, of Appellant's right to *appointed* counsel at a *subsequent* stage of the case:

> For the foregoing reasons, I have concluded that the issues raised in your petition lack merit for PCRA relief. After reviewing the record, I see no additional issues with possible merit which could be raised. I have enclosed with your copy of this letter a copy of the Petition to Withdraw as Counsel I am filing on the same day. **You can submit a response *pro se*, *i.e.*, on your own, or hire a privately retained attorney to submit a response for you**

> **to demonstrate a reviewable basis for PCRA relief** . . . If you intend to do so, you should do so promptly, but certainly within the next 30 days.
>
> If [the PCRA court] reviews this letter and agrees with my assessment, he will permit me to withdraw as your counsel. **You may then still file a *pro se* appeal to the Superior Court of Pennsylvania or hire a private attorney to do it for you. You would have 30 days from the date of Judge Snyder's order denying PCRA relief to do so.**

Id. (emphasis added).

A few months after Appellant's appointed PCRA counsel had moved to withdraw, the PCRA court filed a notice of its intent to summarily dismiss Appellant's PCRA petition. On the same date, the PCRA court granted PCRA counsel leave to withdraw. ***See*** PCRA Court Order, 10/6/2025. The PCRA court advised Appellant in the order that, "since counsel is being permitted to withdraw, [Appellant] may proceed *pro se* or with private counsel." ***Id***.

A day after Appellant's appointed PCRA counsel was granted withdrawal from representation in the post-conviction matter, the York County Probation Department filed a petition to have Appellant's parole revoked. It was alleged in the petition that Appellant had failed to complete court-ordered sex offender treatment.

During the resulting parole revocation proceedings, Appellant was not appointed counsel.[1] Nor did the trial court conduct a colloquy to inform

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[1] The record show that Appellant met the financial qualifications for court-appointed counsel at every prior stage of his case, and nothing in the record suggests that Appellant's financial circumstances materially changed.

Appellant of his right to be represented. Instead, Appellant filed *pro se* responses to the petition for revocation; he also appeared at the revocation hearing *pro se*. Rather than ask Appellant whether he wished to waive the right to counsel, the trial court merely asked Appellant at the outset of the revocation hearing, "[I]s it your desire to continue to represent yourself?" N.T. Revocation Hearing, 10/29/2025, at 3. Appellant replied in the affirmative, and he continued to represent himself for the remainder of the hearing, at which the parties presented witness testimony and argument. ***See id***., at 5-22. The trial court ultimately revoked Appellant's parole and sentenced him to the remaining balance of his unserved prison sentence – 623 days.

Appellant timely filed an appeal,[2] and in his brief – prepared with the aid of appointed counsel – he now raises a single issue for our consideration:

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[2] The judgment of sentence was imposed on October 29, 2025, and Appellant's *pro se* notice of appeal was filed over 30 days later, on December 2, 2025. On January 21, 2026, this Court entered an order for Appellant to show cause why the appeal should not be quashed as untimely. ***See*** Pa.R.A.P. 903(a) ("the notice of appeal . . . shall be filed within 30 days after the entry of the order from which the appeal is taken."); Pa.R.A.P. 105(b) ("an appellate court . . . may not enlarge the time for filing a notice of appeal").

Appellant's counsel filed a response the next day, providing evidence of timely filing under the "prisoner mailbox rule." ***See*** Pa.R.A.P. 121(f) ("A pro se filing submitted by a person incarcerated in a correctional facility is deemed filed as of the date of the prison postmark or the date the filing was delivered to the prison authorities for purposes of mailing as documented by a properly executed prisoner cash slip or other reasonably verifiable evidence). The show-cause order was therefore discharged on March 4, 2026.

> Is [Appellant] entitled to a new parole revocation hearing where he proceeded *pro se* at his hearing after he was allowed to waive counsel without the colloquy required under Pa.R.Crim.P. 121?

Appellant's Brief, at 4. The Commonwealth has filed no brief in response.

Appellant's central claim is that the trial court violated his right to counsel in the present parole revocation matter by allowing him to proceed *pro se* without advising him of the right to representation. The trial court found that no colloquy was necessary at that stage because Appellant had previously litigated his PCRA petition *pro se*, and he made no inquiry about his right to an appointed attorney after the petition to revoke parole was filed. ***See*** Trial Court 1925(a) Opinion, 12/31/2025, at 3-4.

Accordingly, the dispositive issue here is whether, during his PCRA matter (or at any point in his case), Appellant validly waived the right to counsel. If so, then under the "ongoing waiver" rule recognized in ***Commonwealth v. Phillips***, 141 A.3d 512 (Pa. Super. 2016), no additional colloquy was needed in order for Appellant to validly waive the right to counsel at his parole revocation proceedings. ***See Phillips***, 141 A.3d at 521 ("[W]e now hold that once a defendant has made a competent waiver of counsel, that waiver remains in effect throughout all subsequent proceedings in that case absent a substantial change in circumstances.").

"It is clear that indigent criminal defendants are entitled to state-appointed counsel to assist them in resisting the revocation of their parole." ***Bronson v. Penn. Bd. of Probation and Parole,*** 421 A.2d 1021, 1026 (Pa.

1980) (citing ***Commonwealth ex rel. Rambeau v. Rundle***, 314 A.2d 842, 846 (Pa. 1973)). The Pennsylvania Rules of Criminal Procedure do not contemplate the revocation of a defendant's parole unless appointed counsel has been offered. ***See*** Pa.R.Crim.P. 708(B)(1) (parole revocation only permissible if "a hearing [was] held as speedily as possible at which the defendant is present and represented by counsel"). Relatedly, the Public Defender Act guarantees that counsel will be furnished in any parole proceeding in which the accused is unable to obtain one for lack of sufficient funds:

> (a) The public defender shall be responsible for furnishing legal counsel, in the following types of cases, to any person who, for lack of sufficient funds, is unable to obtain legal counsel:
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> * * * *
>
> (10) Probation and parole proceedings and revocation thereof.

16 P.S. § 9960.6(a)(10).

In Pennsylvania and federal law, the right to counsel is so significant that its waiver may not be given legal effect unless the defendant's decision has been fully informed, intelligently considered, and willingly made. ***See generally Commonwealth v. Phillips***, 93 A.3d 847, 852-54 (Pa. Super. 2014). The Parole Board's administrative regulations provide in pertinent part that when a parolee has been charged with a technical violation, the "parolee shall be notified of . . . [t]he right to retain counsel, and the name and address of the public defender of the county of confinement." 37 Pa. Code §

71.2(1)(iv). "[R]easonable steps must be taken to ensure that a parolee has ample opportunity to retain counsel of his or her choice or secure the services of a public defender." ***Jester v. Penn. Bd. of Probation and Parole***, 595 A.2d 748, 751 (Pa. Cmwlth. 1991) (citing ***O'Hara v. Penn. Bd. of Probation and Parole***, 487 A.2d 90, 95 (Pa. Cmwlth. 1985)).

Even in cases which do not implicate a constitutional right,[3] an on-the-record colloquy is a valuable means of ensuring the validity of a purported waiver:

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[3] There appears to be no controlling decisions which categorize representation at a parole revocation proceeding as a constitutional right under Pennsylvania or federal law. The Commonwealth Court has held that "there is no absolute right under either the Sixth Amendment or the Fourteenth Amendment [of the United States Constitution] to be afforded counsel at a parole or probation revocation hearing." ***Jester v. Penn. Bd. of Probation and Parole***, 595 A.2d 748, 751 (Pa. Cmwlth. 1991) (citing ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973)). Finding that a parole revocation hearing is "civil in nature," the Commonwealth Court held that the Rules of Criminal Procedure do not apply, and that the "extensive on-the-record colloquy as envisioned by [Pa.R.Crim.P. 121] is not required in order for a parolee to effectuate a valid waiver of counsel." ***Id***.

In a case involving a *probationer's* right to counsel, this Court declined to "adopt [the Commonwealth Court's] statement of the law[.]" ***Commonwealth v. Murphy***, 214 A.3d 675, 679 n3. (Pa. Super. 2019). However, this Court did not directly opine on the nature of a *parolee's* right to counsel, so that discrete issue was left undecided. ***See id***.

For present purposes, it is unnecessary for this Court to determine whether a parolee's waiver of counsel is subject to a stringent constitutional standard, *i.e.*, the requirements Pa.R.Crim.P. 121. The complete lack of a waiver of counsel by Appellant, and the complete lack of a colloquy as to the right to representation, entitle Appellant to relief regardless of whether a parolee's right to counsel is constitutionally mandated.

> [A]n on-the-record colloquy is a useful procedural tool whenever the waiver of any significant right is at issue, constitutional or otherwise, e.g., waiver of a trial, waiver of the right to counsel, waiver of the right to call witnesses, waiver of the right to cross-examine witnesses, waiver of rules-based speedy trial time limits, etc. But the colloquy does not share the same status as the right itself. Nevertheless, on-the-record compliance with the applicable procedural rules governing the waiver of a particular right preserves the integrity of the record in the event of a later attack on the waiver.

Phillips, 93 A.3d at 853 (internal citations and quotations omitted). "Deprivation of the right to counsel, or the right to waive counsel, can never be harmless." ***Phillips***, 141 A.3d at 517 (citing ***Commonwealth v. Payson***, 723 A.2d 695, 699-700 (Pa. Super. 1999)).

Here, in its 1925(a) opinion, the trial court attempted to justify the lack of a waiver colloquy at the parole revocation hearing by relying on Appellant's supposed waiver of counsel during his earlier PCRA proceedings. The trial court reasoned that since Appellant had validly waived the right to counsel when his PCRA petition was litigated, and the circumstances of the case did not materially change, there was an "ongoing waiver" that extended to the present stage of Appellant's case:

> Here, the record demonstrates that [Appellant] knowingly and voluntarily waived counsel and that no substantial change in circumstances occurred requiring a renewed, formal colloquy. **Prior to the [parole] violation hearing, [Appellant] litigated a separate PCRA matter in which appointed counsel was granted leave to withdraw. In that proceeding, [Appellant] was expressly advised of his right to retain private counsel or to proceed *pro se*, and he affirmatively chose self representation.**

> [Appellant] thereafter filed multiple *pro se* pleadings, including a *pro se* notice of appeal, reflecting his understanding of the right to counsel and the consequences of proceeding without one.
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> Importantly, the Court did not rely solely on [Appellant's] prior *pro se* status. At the outset of the [parole] violation hearing, the Court again addressed [Appellant's] representation status and expressly inquired whether he wished to continue representing himself. See N.T. [Parole] Violation Hr'g, 10/29/25, at 3 ("[Trial Court]: . . . [I]s it your desire to continue to represent yourself?" "[Appellant]: Yes[.]"). [Appellant] unequivocally confirmed his desire to proceed *pro se*. He did not request counsel, express confusion regarding his rights, or indicate any desire to alter his prior waiver.

Trial Court 1925(a) Opinion, 12/31/2025, at 3-4 (emphasis added).

We do not find the trial court's rationale to be persuasive or even based on a correct reading of the facts. Appellant never received a colloquy regarding his right to appointed counsel in his parole revocation hearing after the time when his PCRA counsel withdrew, and he never waived that right. PCRA counsel only sought to withdraw – against Appellant's wishes – for lack of a meritorious issue to raise. While Appellant was advised at the time of PCRA counsel's withdrawal that he was permitted to privately retain counsel or proceed *pro se*, he was *never* told that he would prospectively have a right to appointed counsel if a petition for parole revocation were to be filed against him. Accordingly, the "ongoing waiver" rule cannot apply because a waiver of counsel had never taken place with respect to his parole revocation hearing.

The trial court nevertheless assumed, as an alternative ground for affirmance, that Appellant intended to waive counsel at the parole violation proceedings because he had represented himself at the PCRA stage of his

case; he stated at the revocation hearing that he wished to continue representing himself; and he made no inquiry into the right to counsel. ***See id***. This presumption of waiver was completely unsupported. Again, the record shows that Appellant was not offered appointed counsel at the parole revocation hearing, and no reasonable steps were taken to ensure that Appellant knew that he had access to one.

Indeed, Appellant's responses to the trial court's inquiries were entirely consistent with an understanding that he had *no* right to appointed counsel, and the only way to obtain counsel was to privately retain an attorney. ***See*** N.T. Parole Violation Hearing, 10/29/2025, at 3. He was told as much at the PCRA stage, and Appellant received no clarification that he later would be entitled to counsel at the parole revocation hearing despite PCRA counsel's previous withdrawal.

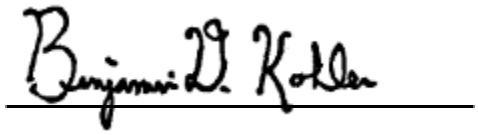
In sum, then, the trial court violated Appellant's right to counsel, and the error was presumptively prejudicial. To correct that error, the judgment of sentence must be vacated, and the case remanded for a new parole violation hearing at which Appellant must be fully advised of his right to counsel.[4]

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[4] As discussed above, it is not necessary for our disposition to determine whether a parolee has a *constitutional* right to counsel, or relatedly, whether the waiver colloquy requirements of Pa.R.Crim.P. 121 apply at a parole revocation hearing. Appellant would now be entitled to relief even if we were to agree with the Commonwealth Court that Rule 121 does not apply. ***See***
(Footnote Continued Next Page)

Judgment of sentence vacated. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/12/2026

Jester, 595 A.2d at 751 (holding that "extensive on-the-record colloquy" required for waiver of counsel in a criminal case is not necessary for a parolee's waiver of counsel because such "civil" proceedings do not implicate the constitutional right of a criminal defendant to be represented).