IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	**No: 98-12,087**
	:	
JOHN COOKE,	:	
Defendant	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(A) OF THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order of Sentence dated October 17, 2002. He specifically raises three issues for review by the Pennsylvania Superior Court. First, he claims that this Court erred in treating his Post-Conviction Relief Act (hereinafter "PCRA") petition as a second or subsequent PCRA petition and therefore erred in effectively denying him representation of counsel. Second, Defendant claims that this Court erred when it failed to provide him with twenty (20) days notice of its intention to dismiss his PCRA petition. Third, Defendant claims that this Court erred in denying his petition because he asserts that he is entitled to court-appointed counsel through the filing of a writ of certiorari to the Pennsylvania Supreme Court. This Court will address only the second issue raised by Defendant.

The Defendant alleges that the Court erred when it failed to provide him with twenty (20) days notice of its intention to dismiss his PCRA petition. Initially, the Court notes that Defendant's appeal arises from an order of this Court dated October 17, 2002 and filed October 22, 2002, the body of which states "AND NOW, this 17th day of October, 2002, the Defendant's request for extension of time is

DENIED." The docket entry regarding this order lists it as "Order Dismissing Post-Conviction Relief Act Petition" even though no such dismissal of Defendant's PCRA petition is mentioned in the Order. However, as it appears from the PCRA petition that the only relief requested by Defendant was an extension of time, the Court's Order does effectively deny his request for PCRA relief. Under Pennsylvania Rule of Criminal Procedure 907(1), where the Court is satisfied that there are no issues of genuine fact, that a defendant is not entitled to PCRA relief and therefore that no purpose would be served by any further proceedings, then the Court may dismiss a PCRA petition without a hearing, but only after the parties have been given at least twenty (20) days notice of the Court's intention to dismiss. Here, there was no such twenty day (20) day notice given. At this point in time, however, this Court is without jurisdiction to issue an additional Order either dismissing or granting the PCRA petition. For this reason, this Court agrees with Defendant that his appeal should be granted and his case should be returned so that an appropriate Order can be entered.

Regardless of this ruling, the Court believes that no genuine issues of fact are raised in Defendant's PCRA petition and that he is not entitled to relief. In support, the Court shall review the additional issues raised by the Defendant.

The first issue raised by the Defendant in his 1925(b) statement is also drawn from this Court's Order denying Defendant's request for extension of time. He alleges based on that Order alone that this Court erred in treating his PCRA petition as a second or subsequent PCRA petition, thereby effectively denying him assistance of counsel. The Court is not clear as to why Defendant alleges that he has

been effectively denied assistance of counsel or why he alleges that this Court erred in treating this as a second or subsequent PCRA petition or why he implies that his case has been prejudiced by the actions of the Court if in fact this were viewed as a second or subsequent PCRA petition. This Court agrees that a "first-time *pro se* PCRA petitioner is entitled to the benefit of the assistance of counsel to help identify and properly present potentially meritorious issues for the trial court's consideration." Commonwealth v. Padden, 783 A.2d 299 (Pa. Super. 2001); see also Pa.R.Crim.P. Rule 904(b). Additionally, under Rule 904(c), an indigent defendant is entitled to appointed counsel when, on a second or subsequent PCRA petition, an evidentiary hearing is required per Rule 908. Under Rule 904(d), the judge is directed to appoint counsel "whenever the interests of justice require it." Indeed, the Defendant in this matter is represented by appointed counsel. Given that Defendant's original PCRA petition was granted for the sole purpose of permitting a first appeal as of right, which trial counsel had failed to file despite Defendant's wishes that such an appeal be filed, nothing this Court has done treats Defendant's current PCRA petition as anything but a "first" petition. See Commonwealth v. Lewis, 718 A.2d 1262, (Pa. Super. 1998), (holding that where earlier PCHA petition did not result in post-conviction relief per se, but resulted in Defendant receiving the right to directly appeal his judgment of sentence *nunc pro tunc*, court does not consider earlier petition to be a prior PCRA petition.)

The Defendant's remaining issue alleges that he is entitled to court-appointed counsel through the filing of a writ of certiorari to the Pennsylvania Supreme Court. In support of this position, Defendant cites Commonwealth v.

Robinson, 682 A.2d 831 (Pa.Super. 1996), which holds that "an accused has a constitutional right to counsel on direct appeal", Robinson, id., citing Commonwealth v. Peterkin, 649 A.2d 121, 538 Pa. 455 (1994), and Commonwealth ex. rel. Firmstone v. Myers, 196 A.2d 209, 202 Pa. 292 (1963). Firmstone "affirms on the opinion of Judge GREEVY of the Court of Quarter Sessions of Lycoming County." Id., p. 293, 210. Reference to that opinion, found at 32 D & C 69 (1963), shows that "appointed counsel should in the proper case seek the highest appellate review consistent with any trial errors that have been made. . . (w)hen appellate reviews in a direct line have been exhausted, then an indigent defendant is no longer entitled to court-appointed counsel". The Court goes on to say, however, that in "collateral type actions the appointment of counsel should be discretionary with the court, dependent upon the facts of each case separately." Firmstone, 32 D & C 69, at p. 71. Clearly, a PCRA petition is a collateral action for which the Firmstone court might or might not have appointed counsel. That decision was, of course, issued long before our current Rules of Criminal Procedure were promulgated.

The issue raised here by the Defendant is very similar to an issue decided in Commonwealth v. Byrd, 657 A.2d 961, 441 Pa. Super. 351 (1995). In that case, a claim was made that defense counsel was ineffective for failing to petition for allocatur to the Supreme Court with respect to the substantive issues raised on appeal to the Superior Court. The Court opined that

> an appeal to our Supreme Court is not a matter of right, but of sound judicial discretion. Pa.R.A.P. 1114; Commonwealth v. Tanner, 410 Pa. Super. 398, 600 a.2d 201 (1991), appeal denied, 530 Pa. 654, 608 A.2d 29 (1992). Review by the Supreme Court is "purely discretionary and will be granted only where there exist both special and important reasons. Pa.R.A.P. 1114. It would be illogical to conclude that a miscarriage of justice occurred by counsel's failure to seek Supreme

Court review unless it is established that the issue was such that review would have been granted by the Supreme Court." Commonwealth v. Gilbert, 407 Pa. Super. 491, 595 A.2d 1258 (1991). Id. at 962.

The Court then went on to hold that because the Appellant in that case had failed to set forth facts or arguments establishing that the issues which he would have raised in the Supreme Court had merit such that the Supreme Court would have exercised its discretion and reviewed his issues, there can be no relief on Appellant's claim of ineffectiveness. Id. Other, earlier cases, have reached similar conclusions. For example, in Commonwealth v. Gilbert, 595 A.2d 1254, 407 Pa. Super. 491 (1991), the Superior Court engaged in a lengthy analysis of the evolution of Pennsylvania law on this subject. There, the appellant contended, as does Defendant here, that he was automatically entitled to "reinstatement of his right to petition for allowance of appeal *nunc pro tunc* from (the Superior Court's) decision in his direct appeal." Id. at 1256. The Superior Court disagreed, explaining that under Commonwealth v. Morrow, 474 A.2d 322, 326 Pa.Super. 443 (1984), where a defendant "knows of his right to file a petition for allowance of appeal, counsel is not automatically deemed ineffective for failing to seek review by the Supreme Court." Id. The Gilbert court then went on to hold that "(r)eview by the Supreme Court following Superior Court review is not constitutionally guaranteed," Id. and that therefore in order to prevail, a PCRA claimant alleging ineffective assistance of counsel because of failure to petition for allocatur to the Pennsylvania Supreme Court must establish that a review "would have been granted by the Supreme court." Id. Significantly, the Court then explained that their reasoning rests upon the conclusions of the United States Supreme Court that "an indigent defendant does not

have to be provided free counsel for purposes of a discretionary appeal." Id. See Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (constitution requires court-appointed counsel for first appeal as of right) and Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (there is no constitutional right to court-appointed counsel for pursuit of discretionary appeal.) See also Austin v. United States, 513 U.S. 5, 130 L. Ed. 2d 219, 115 S. Ct. 380 (1994) (although indigent defendants pursuing appeals as of right have a constitutional right to a brief filed on their behalf by an attorney, Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), that right does not extend to forums for discretionary review).[1]

Analysis of the Defendant's claims in this case therefore depends upon an analysis of the issues that he raises in his PCRA petition. In Section 5 of his PCRA petition, Defendant alleges that his motion is based upon the error of his appellate counsel because counsel failed to notify him of the denial of his appeal prior to the expiration of the filing time for an appeal to the Supreme Court. Similar claims, asserting that counsel failed to inform a Defendant of his right to seek discretionary review by the Supreme Court are not cognizable under the PCRA statute.

[1] Pennsylvania courts have reached similar conclusions. In the year following the Firmstone decision in Lycoming County, the Pennsylvania Supreme Court held in Commonwealth v. Silva, 204 A.2d 455, 415 Pa. 537 (1964) that while a defendant "is entitled to an appeal to the Superior Court, *as of right* (emphasis in the original)", that same person "*has no right of appeal* (emphasis in the original) to the Supreme Court. . . (t)o repeat, defendant's only *appeal as of right* (emphasis in the original) is to the Superior Court." Id., at 455 – 456. The Court then emphasized that "if the accused is indigent the Commonwealth must in every alleged felony and in every serious case furnish him, whether requested or not, counsel for his defense (a) at every critical stage of the proceedings below; and (b) in any direct appeal from a judgment of sentence which he has as of right." Id. (citations omitted).

Commonwealth v. Tanner, 600 A.2d 201, 410 Pa.Super. 398 (1991). In Tanner, supra., the court held that the only PCRA category under which a claim such as this could arguably be brought is Section 9545(a)(2)(ii), which allows relief where there has been "ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." Id. This has been interpreted to mean that any ineffectiveness claim must raise a question of whether an innocent person has been convicted. Id. See also Commonwealth v. Perlman, 572 A.2d 2, 392 Pa.Super. 1 (1990). Additionally, it has been acknowledged that the language in the PCRA "referring to ineffectiveness claims constitutes "a substantial restriction on the grounds for post-conviction collateral relief in Pennsylvania."" Id. citing Commonwealth v. Thomas, 578 a.2d 422, 396 Pa.Super. 92 (1990). Where a claimant under the PCRA does not explain how the truth-determining process was undermined or allege that appellate counsel's actions prevented a reliable determination of guilt or innocence, his claim is not cognizable under the PCRA. Id. at 205. This is so because where "omissions of trial counsel were not shown to have any chance of succeeding, appellate counsel had no reasonable grounds upon which to assert trial counsel ineffectiveness upon appeal." Id. Such claims would be frivolous. A PCRA claim that appellate counsel was ineffective for not raising a meritless claim must fail. Id. See also Commonwealth v. Hubbard, 372 A.2d 687, 472 Pa. 259 (1977).

As noted above, Defendant's PCRA petition asserts only that his counsel "was ineffective for failing to notify me of the denial of my appeal prior to the

expiration of the filing time for an appeal to the Supreme Court." Defendant's PCRA petition, Section 5. He makes no allegations of any kind that the ineffectiveness of his counsel so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, as is required by the PCRA statute under 42 Pa.C.S.A. Section 9542(a)(2)(ii). His third claim for relief must therefore fail.

In summary, this Court agrees that under Pennsylvania Rule of Criminal Procedure 907(1), the Defendant was entitled to twenty (20) days notice prior to issuance of an order which defeated his PCRA claim. However, this Court also concludes that if the twenty (20) day notice had been given, Defendant's claim would thereafter have been properly denied.

By the Court,

_____ J.
Nancy L. Butts, Judge

xc: DA
Eric Linhardt, Esquire
Honorable Nancy L. Butts
Gary Weber, Esquire
Diane L. Turner, Esquire