

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT OP 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
RICHARD ALLAN MAITRE II	:	
	:	
Appellant	:	No. 1235 EDA 2022

Appeal from the PCRA Order Entered April 8, 2022
In the Court of Common Pleas of Chester County Criminal Division at
No(s): CP-15-CR-0000516-2017

BEFORE: OLSON, J., NICHOLS, J., and McLAUGHLIN, J.

MEMORANDUM BY OLSON, J.:

FILED JANUARY 22, 2024

Appellant, Richard Allan Maitre, II, appeals from the order entered on April 8, 2022 that dismissed, without a hearing, his first petition filed pursuant to the Post Conviction Relief Act (PCRA).¹ After careful review, we affirm the PCRA court's substantive rulings which denied relief on the collateral claims raised in Appellant's original PCRA petition and in his response to the court notice issued pursuant to Pa.R.Crim.P. 907. Notwithstanding, we remand this matter pursuant to ***Commonwealth v. Bradley***, 261 A.3d 381 (Pa. 2021) for additional proceedings that will permit the PCRA court to consider the claims of ineffective assistance of PCRA counsel raised by Appellant for the first time on appeal.

¹ 42 Pa.C.S.A. §§ 9541-9546.

We briefly set forth the facts and procedural history of this case as follows. “Appellant was charged with 578 offenses related to his participation in the sale of methamphetamine throughout Chester County, Pennsylvania, from January 2016 to January 2017.” ***Commonwealth v. Maitre***, 240 A.3d 158 (Pa. Super. 2020) (unpublished memorandum) at *1. “On September 26, 2018, Appellant entered an open guilty plea to five counts of [possession with intent to deliver], and one count each of conspiracy and criminal use of a communication facility.^[2] On August 22, 2019, Appellant was sentenced to an aggregate term of 20 to 40 years of incarceration.” ***Id.*** We affirmed Appellant’s judgment of sentence in an unpublished memorandum on August 13, 2020. ***Id.***

Appellant filed a timely, counseled PCRA petition on August 11, 2021. On August 16, 2021, the PCRA court ordered counsel for Appellant to file a brief in support of his PCRA petition and counsel complied timely. On October 25, 2021, the PCRA court ordered the Commonwealth to file a response. On December 9, 2021, the Commonwealth complied timely. On February 14, 2022, the PCRA court sent Appellant notice of its intent to dismiss his PCRA petition without an evidentiary hearing pursuant to Pa.R.Crim.P. 907. In that notice, the PCRA court briefly addressed all of the issues contained in the PCRA petition and detailed the court’s reasoning why Appellant was not entitled to

² 35 P.S. § 780-113(a)(30), 18 Pa.C.S.A. § 903, 18 Pa.C.S.A. § 7512(a), respectively.

relief. On March 7, 2022, Appellant filed a counseled response to the PCRA court's notice of intent to dismiss. On April 8, 2022, the PCRA entered an order dismissing Appellant's PCRA petition. This timely appeal resulted.³

On appeal, Appellant presents the following issue for our review:

Whether direct appeal counsel and PCRA counsel were ineffective for failing to raise [plea] counsel's ineffectiveness during plea/sentencing proceedings, by inducing [Appellant] to accept an open/plea sentence with unenforceable negotiated terms, and a sentence that is illegal?

Appellant's Brief at 9 (unnecessary capitalization omitted).

Appellant was on parole when he committed and received his sentence for the crimes detailed above. Essentially, Appellant now contends that

³ On May 4, 2022, counsel who filed the original PCRA petition, Evan J. Kelly, Esquire filed a timely notice of appeal and a corresponding motion to withdraw from representing Appellant. On May 13, 2022, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On June 6, 2022, Appellant filed a timely, *pro se* concise statement pursuant to Pa.R.A.P. 1925(b). On June 10, 2022, the PCRA court entered an order granting Attorney Kelly's motion to withdraw and accepting Appellant's *pro se* Rule 1925(b) concise statement. On June 1, 2022, Attorney Kelly also filed a motion to withdraw as counsel with this Court. On July 12, 2022, the PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a) relying largely upon the reasoning set forth in its orders entered on February 14, 2022 (notice of intent to dismiss) and April 8, 2022 (dismissal of PCRA petition). On July 12, 2022, this Court entered an order permitting Attorney Kelly to withdraw. We further directed the PCRA court to determine whether Appellant was entitled to court-appointed counsel. Pursuant to our directive, on August 19, 2022, the PCRA court appointed new PCRA counsel, Kathleen J. Boyer, Esquire to represent Appellant on appeal. On January 20, 2023, Jason Javie, Esquire entered his appearance as substitute counsel on behalf of Appellant. As such, on January 20, 2023, Attorney Boyer praeciped to withdraw as counsel. On February 3, 2023, we granted Attorney Javie additional time to file an appellate brief and he timely complied on March 9, 2023.

original PCRA counsel was ineffective in failing to challenge the performance of plea counsel who unlawfully induced Appellant to plead guilty through promises that his new sentences would run concurrent to any back time sentence imposed for Appellant's parole violation. **See** Appellant's Brief at 12. Citing 61 Pa.C.S.A. § 6138(a)(5), Appellant points out that sentences for crimes committed while on parole must be served consecutively with time remaining on the original sentence; hence, the sentencing scheme alluded to by plea counsel violated the sentencing code.⁴ **Id.** at 18. As such, Appellant currently presents a layered claim of ineffective assistance of counsel, maintaining that PCRA counsel was ineffective in failing to raise plea counsel's ineffectiveness where plea counsel caused Appellant to enter an invalid plea based upon inducements that violated provisions of the Sentencing Code set forth at 61 Pa.C.S.A. 6138(a)(5). Hence, Appellant argues that he "received ineffective assistance of counsel and his judgment of sentence should be vacated[.]" **Id.** at 24.

Appellant, of course, did not challenge the competence of PCRA counsel in either his PCRA petition⁵ or in response to the PCRA court's notice of intent

⁴ "If a new sentence is imposed on the offender, the service of the balance of the term originally imposed by a Pennsylvania court shall precede the commencement of the new term imposed[.]" 61 Pa.C.S.A. § 6138(a)(5).

⁵ In his PCRA petition, Appellant presented three claims alleging plea counsel ineffectiveness. First, Appellant claimed that "the [Commonwealth] promised [Appellant] that if he pled [guilty to an] open [plea,] he would receive [a sentence under the Recidivism Risk Reduction Incentive Act], a letter to the (Footnote Continued Next Page)

to dismiss pursuant to Pa.R.Crim.P. 907.⁶ Instead, he raises it for the first time on appeal. Recently, our Supreme Court in **Bradley, supra**, held that “after a PCRA court denies relief, and after obtaining new counsel or acting *pro se*, [a petitioner may] raise claims of PCRA counsel's ineffectiveness at the first opportunity to do so, even if on appeal.” **Bradley**, 261 A.3d at 401 (footnote omitted). The **Bradley** Court recognized that “a petitioner has a rule-based right to the appointment of counsel for a first PCRA petition” and, with that right, he is “entitled to the effective assistance of counsel.” **Id.** at

state parole board, [a] 15[-year cap on his [negotiated plea] sentence, and [to] give [Appellant] a written offer before sentencing.” Brief in Support of PCRA Petition, 9/30/2021, at 2. As such, Appellant averred plea counsel was ineffective in “the plea bargaining-process.” **Id.** Next, Appellant alleged plea counsel failed to provide him with discovery resulting in the unlawful inducement of an open plea. Finally, Appellant averred that counsel failed to properly calculate his prior record score. Appellant has abandoned these issues on appeal and, therefore, Appellant’s original ineffective assistance of counsel claims are waived. **See** Pa.R.A.P. 2119(a); **Commonwealth v. Clayton**, 816 A.2d 217, 221 (Pa. 2002) (citation omitted) (“[U]ndeveloped claims are waived and unreviewable on appeal.”). Moreover, in his response to the PCRA court’s Rule 907 notice, Appellant raised an issue pertaining to wiretaps and reiterated his claim that counsel was ineffective for failing to obtain a written plea offer. Those issues are not raised currently and are likewise waived. Accordingly, we affirm the PCRA court’s rulings regarding the issues raised in Appellant’s original PCRA petition, as well as the issue raised in Appellant’s response to the PCRA court’s Rule 907 notice. Appellant is precluded from further challenging those determinations on remand.

⁶ Prior to our Supreme Court's decision in **Bradley, supra**, “the sole method by which a petitioner [could] challenge the ineffectiveness of his PCRA counsel [was] through the filing of a response to the PCRA court's [Pa.R.Crim.P.] 907 dismissal notice.” **Bradley**, 261 A.3d at 386. Finding this Rule 907 procedure to be “deeply flawed,” the **Bradley** Court explicitly “abandon[ed the] Rule 907 approach as the sole procedure for challenging PCRA counsel's effectiveness.” **Id.** at 401.

391-392 (stating, “[t]he guidance and representation of an attorney during collateral review ensures that meritorious legal issues are recognized and addressed, and that meritless claims are abandoned”). In balancing a petitioner's right to effective assistance of counsel and society's interest in the efficient and final conclusion of criminal matters, our Supreme Court held that permitting “a petitioner to raise claims of PCRA counsel's ineffectiveness at the first opportunity when represented by new counsel, even if on appeal, while not an ideal solution, accommodates these vital interests.” **Id.** at 401. The **Bradley** Court further stated that a claim of PCRA counsel ineffectiveness raised for the first time on collateral appeal did not violate the PCRA one-year jurisdictional time-bar because such a claim of PCRA counsel ineffectiveness “sprang” from the original, timely PCRA petition and did not constitute a second or subsequent petition. **Id.** at 402, 404 (rejecting “the notion that considering ineffectiveness claims on collateral appeal constitutes a prohibited serial petition, violating the PCRA's one-year [jurisdictional] time bar” (footnote omitted)). “In some instances, the record before the appellate court will be sufficient to allow for disposition of any newly-raised ineffectiveness claims[; h]owever, in other cases, the appellate court may need to remand to the PCRA court for further development of the record and for the PCRA court to consider such claims as an initial matter.” **Id.** at 402 (citations omitted). “Where there are material facts at issue concerning claims challenging counsel's stewardship and relief is not plainly unavailable as a

matter of law, the remand should be afforded[.]” **Id.** at 402 (citations, quotations, and original brackets omitted).

The Commonwealth concedes that “under **Bradley**, [Appellant’s] issue is properly before [this] Court.” Commonwealth’s Brief at 12. We agree, as this is Appellant’s first opportunity to challenge the stewardship of PCRA counsel within the context of a timely PCRA petition. Moreover, upon review, Appellant has come forward with a colorable basis to support his claims. Here there is evidence in the record that plea counsel asked the court to consider concurrent sentences, contrary to the Sentencing Code, and, therefore, may have induced Appellant’s reliance upon counsel’s advice. **See** N.T., 8/22/2019, at 57-59. Appellant may have been prejudiced because he elected to plead guilty based upon the promise of concurrent sentences. Without the benefit of an evidentiary hearing and relevant findings of fact, we need to remand the case for further development of the record and for the PCRA court to consider the claim as an initial matter. **See Commonwealth v. Grayson**, 212 A.3d 1047, 1054-1055 (Pa. Super. 2019) (citations omitted) (“Generally, if there are factual issues to be resolved, the PCRA court should hold an evidentiary hearing.”); **see also Commonwealth v. Hanible**, 30 A.3d 426, 442 (Pa. 2011) (citation omitted) (“As to the reasonable basis prong [of the test for counsel effectiveness], [our Supreme Court] recognize[d] that, generally, [] court[s] should not glean from the record whether counsel had a reasonable basis for his action or inaction absent an evidentiary hearing, and

that it is only in the most clear-cut cases that the reasons for counsel's conduct are apparent from the record.”).

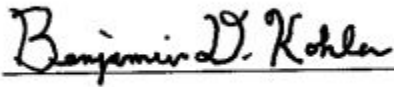
Accordingly, we vacate the April 8, 2022 order denying PCRA relief,⁷ but remand this case to the PCRA court so that current PCRA counsel may file an amended PCRA petition that, *inter alia*, sets forth a viable, layered ineffectiveness claim based on the arguments relating to the stewardship of plea counsel. Thereafter, the PCRA court shall conduct an evidentiary hearing for the purpose of considering Appellant's current underlying claim of ineffectiveness of plea counsel. The focus of the PCRA court's inquiry on remand shall be PCRA counsel's alleged ineffectiveness in failing to challenge plea counsel's performance in advising Appellant to enter an open guilty plea. The PCRA court, however, should not initially disturb the original sentence itself. Instead, the PCRA court must first assess whether Appellant entered into his open plea in a knowing, voluntary, and intelligent manner. If Appellant did not enter into a valid plea, then the appropriate course of action would be to order the withdrawal of Appellant's guilty plea, vacate the judgment of sentence, and schedule the matter for trial. If, however, the PCRA court determines that Appellant entered a valid guilty plea, then the

⁷ Although we are vacating the order that dismissed Appellant's PCRA petition, we affirm the PCRA court's substantive determinations insofar as the court denied the claims presented in Appellant's original PCRA petition. Appellant has not challenged those rulings, thereby waived his original PCRA claims as noted previously and, upon remand, is precluded from rearguing the issues identified in footnote 5, *supra*.

court should simply amend Appellant's current judgment of sentence to conform with 61 Pa.C.S.A. § 6138(a)(5).

Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/22/2024