IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	No. 289-CR-2008
	:	
MERRICK STEVEN KIRK DOUGLAS,	:	
Defendant	:	

Criminal Law – PCRA - Ineffective Assistance of Counsel - Direct Appeal Rights - Failure to Request Supreme Court Review

1. To establish a claim for ineffective assistance of counsel, a defendant must demonstrate: (1) the underlying legal claim has arguable merit; (2) counsel's action or omission lacked any reasonable basis designed to serve his client's interest; and (3) there is a reasonable probability that the outcome of the proceedings would have been different had counsel not been ineffective in the relevant regard – i.e., that the petitioner was prejudiced by counsel's act or omission.
2. An unjustified failure to file a requested petition for allowance of appeal is ineffectiveness of counsel *per se*.
3. Independent of counsel's failure to file an appeal requested by a defendant, counsel has a duty to consult with his client about the client's appellate rights. Counsel may be found ineffective for a failure to consult, and prejudice will be presumed, where there were issues of merit to raise on direct appeal or the defendant, in some manner, displayed signs of desiring an appeal.

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Jean Engler, Esquire — Counsel for Commonwealth
Assistant District Attorney

Michael P. Gough, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – August 17, 2012

In this collateral proceeding under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, the Defendant, Merrick Douglas, claims, *inter alia*, that he has been deprived of the effective assistance of counsel by counsel's failure to file a petition for allowance of appeal from the Pennsylvania Superior Court's decision affirming, on direct appeal, this court's judgment of sentence. Because we find merit in this claim, Defendant's other claims will not be addressed.

PROCEDURAL AND FACTUAL BACKGROUND

On December 9, 2009, at the conclusion of a jury trial, the jury found Defendant guilty of criminal attempt to commit the crimes of rape by forcible compulsion, aggravated indecent assault by forcible compulsion, aggravated indecent assault

without consent, and sexual assault.[1] Defendant was also convicted of indecent assault by forcible compulsion,[2] indecent exposure,[3] and unlawful contact with a minor.[4] Defendant was acquitted of the crime of rape by forcible compulsion.[5]

Following his convictions and prior to sentencing, Defendant's parents employed new counsel to represent Defendant at sentencing and for the purpose of taking a direct appeal. Although Defendant was not involved in the selection or employment of new counsel, who Defendant first met on the date of sentencing, this change of counsel was done with Defendant's knowledge and consent. Moreover, it was agreed and understood that communication between Defendant and his counsel would be through Defendant's parents. (N.T. 11/18/11, pp. 13, 31, 73).

Defendant was sentenced on March 26, 2010, to an aggregate term of imprisonment in a state correctional facility of not less than six nor more than twelve years. A direct appeal to the Pennsylvania Superior Court was filed on April 9, 2010. Six issues were presented to the Superior Court on appeal: (1) whether the Commonwealth failed to provide the defense with requested and mandatory discovery; (2) whether the trial court erred in allowing the Commonwealth to ask the victim leading

[1] 18 Pa.C.S.A. § 901(a).
[2] 18 Pa.C.S.A. § 3126(a)(2).
[3] 18 Pa.C.S.A. § 3127(a).
[4] 18 Pa.C.S.A. § 6318(a)(1).
[5] 18 Pa.C.S.A. § 3121(a)(1).

questions on direct examination; (3) whether the trial court erred in denying Defendant's request for a mistrial after the investigating trooper testified that Defendant had volunteered to take a polygraph test; (4) whether the evidence was insufficient to sustain Defendant's convictions; (5) whether the verdict was against the weight of the evidence; and (6) whether trial counsel was ineffective both before and during trial.

The Superior Court held that the error claimed with respect to discovery and leading questions had been waived because not included in Defendant's court-ordered Pa.R.A.P. 1925(b) statement of matters complained of on appeal; that the weight of the evidence claim had not been properly preserved by oral motion prior to sentencing or in a post-sentence motion, and was waived; and that the insufficiency of the evidence claim had not been properly briefed and was also waived. The Court further held that the claim for ineffectiveness of counsel was premature under Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), and that the claim for a mistrial was without merit.

The Superior Court's Memorandum Opinion affirming the judgment of sentence is dated May 3, 2011. By letter dated May 5, 2011, appellate counsel forwarded a copy of the Superior Court's Memorandum Opinion to Defendant's father; advised that the Defendant had ten days from May 3, 2011 to file a request for reconsideration with the Superior Court and thirty days from

that date to file a petition for allowance of appeal to the Pennsylvania Supreme Court; and recommended that the petition for allowance of appeal be filed. Defendant's father immediately contacted appellate counsel's office by telephone and email to discuss what issues would be raised on appeal and what the cost would be. (N.T. 11/18/11, pp. 69, 71-72, 75-76). No response was received by Defendant's father from either contact.

Defendant first learned of the Superior Court's decision over the Memorial Day weekend in late May 2011 when he was visited by his parents in prison. Because Defendant's parents were not permitted to bring documents into the prison, a copy of the Superior Court's Memorandum Opinion was not given to Defendant at that time. However, immediately following this meeting, a copy of the opinion was mailed to the Defendant by his parents. Defendant received this copy after the thirty-day period within which to request an allowance of appeal had expired. (N.T. 11/18/11, p.17).

On August 2, 2011, Defendant filed a *pro se* petition for post-conviction relief. Present counsel was appointed, and an amended PCRA Petition was filed on September 27, 2011. Therein, Defendant claims former counsel was ineffective on three primary bases: (1) that trial counsel failed to raise and preserve an alibi defense; (2) that appellate counsel failed to file a

legally adequate statement of matters complained of on appeal; and (3) that appellate counsel failed to petition for allowance of appeal with the Pennsylvania Supreme Court following the Superior Court's affirmance of Defendant's judgment of sentence, and further failed to advise and consult with Defendant as to the advantages and disadvantages of seeking this review by the Supreme Court. Because we find Defendant is entitled to reinstatement of his right to petition the Pennsylvania Supreme Court for direct review of the Superior Court's decision of May 3, 2011, it would be premature and inappropriate for us to address Defendant's remaining PCRA claims.

DISCUSSION

In order to establish a claim for ineffective assistance of counsel, a defendant must demonstrate that: "(1) the underlying legal claim - i.e., that which the petitioner charges was not pursued, or was pursued improperly - has 'arguable merit;' (2) counsel's action or omission lacked any reasonable basis designed to serve his client's interest; and (3) there is a reasonable probability that the outcome of the proceedings would have been different had counsel not been ineffective in the relevant regard - i.e., that the petitioner was prejudiced by counsel's act or omission." Commonwealth v. Dennis, 950 A.2d 945, 954 (Pa. 2008).

In Commonwealth v. Liebel, 825 A.2d 630, 634-36 (Pa. 2003), our Supreme Court held that the unjustified failure to file a requested petition for allowance of appeal is ineffectiveness of counsel *per se*. When a defendant on direct appeal timely requests the taking of a discretionary appeal to the Supreme Court and counsel fails to do so, no further proof of prejudice is required; the defendant need not show that the petition would have been granted, only that the appeal was requested and counsel failed to act. *Id.*; *see also* Commonwealth v. Markowitz, 32 A.3d 706, 714 (Pa.Super. 2011) ("[W]hen a lawyer fails to file a direct appeal requested by the defendant, the defendant is automatically entitled to reinstatement of his direct appeal rights."), *appeal denied*, 40 A.3d 1235 (Pa. 2012).

Independent of counsel's obligation to file an appeal requested by a defendant, is counsel's obligation to consult with the defendant about the propriety of an appeal.

> Where a defendant does not ask his attorney to file a direct appeal, counsel still may be held ineffective if he does not consult with his client about the client's appellate rights. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); [*Commonwealth v.*] *Carter*, [21 A.3d 680 (Pa.Super. 2011)]. Such ineffectiveness, however, will only be found where a duty to consult arises either because there were issues of merit to raise on direct appeal or the defendant, in some manner, displayed signs of desiring an appeal. *Roe v. Flores-Ortega, supra*.

Markowitz, 32 A.3d at 714; *see also* Commonwealth v. Gadsden, 832 A.2d 1082, 1088 (Pa.Super. 2003) (recognizing as a cognizable PCRA issue, a claim of ineffective assistance of counsel for failure to provide adequate consultation to a client with respect to the filing of a petition for *allocatur* with the Pennsylvania Supreme Court), *appeal denied*, 850 A.2d 611 (Pa. 2004); Liebel, 825 A.2d at 635 ("provided that appellate counsel believes that the claims that a petitioner would raise in a [petition for allowance of appeal to the Supreme Court] would not be completely frivolous, a petitioner certainly has a right to file such a petition [under Pa.R.A.P. 1112]").

For such ineffectiveness to justify the granting of relief, the breach of counsel's duty to consult must be shown to have prejudiced Defendant's appellate rights; prejudice *per se* does not exist in this context. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000). "[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Roe, 528 U.S. at 484. "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful

ineffective assistance of counsel claim entitling him to an appeal." *Id.*[6]

Factually, the evidence before us does not support a finding that Defendant asked counsel to file a petition for allowance of appeal. (N.T. 11/18/11, p.36). Defendant's father, though wanting to discuss this issue with appellate counsel, was unsuccessful in contacting counsel. Defendant himself was unaware of the Superior Court's decision until late May 2011 and did not receive a copy of the decision until after the time for filing a petition for allowance of appeal had expired. Nevertheless, we find that counsel acted timely and reasonably in communicating directly with Defendant's parents, through whom counsel was authorized and directed by Defendant to communicate, about the Superior Court's decision[7] and that Defendant did, in fact, learn of this decision before the time to appeal had expired.

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[6] In Commonwealth v. Liebel, the Pennsylvania Supreme Court noted that while a defendant has no federal constitutional right to counsel on a petition for discretionary review, such a right did exist under former Pennsylvania Rule of Criminal Procedure 122(C)(3), now Rule 122(B)(2), which provided that "[w]here counsel has been assigned, such assignment shall be effective until final judgment, including *any proceedings* on direct appeal." 825 A.2d 630, 633 (Pa. 2003) (emphasis in original). This right encompasses the concomitant right to effective assistance of counsel.

[7] Counsel's letter to Defendant's parents advising of the Superior Court's decision is dated May 5, 2011, two days after the date of the Court's decision. As to the delay in Defendant's parents advising Defendant of the decision, this was caused by Defendant's parents' determination to first meet with their son and notify him in person of the decision, rather than mailing a copy to him beforehand. (N.T. 11/18/11, pp. 70-71). Accordingly, this delay is not fairly attributable to counsel.

The question here, however, is closer to that posited in Roe: "Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?" *Id.* at 477. To answer this question, which ultimately involves judging the reasonableness of counsel's challenged conduct under the totality of the circumstances, we must determine whether counsel had a duty to consult with Defendant. Commonwealth v. Bath, 907 A.2d 619, 623-24 (Pa.Super. 2006) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)), *appeal denied*, 918 A.2d 741 (Pa. 2007); Commonwealth v. Touw, 781 A.2d 1250 (Pa.Super. 2001). On this issue, the Superior Court has summarized the pertinent law arising from the Roe and Touw decisions as follows:

> The *Roe* Court begins its analysis by noting: "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 477 [120 S.Ct. 1029.] In *Commonwealth v. Touw*, 781 A.2d 1250 (Pa.Super.2001), this Court concisely summarized the remainder of the *Roe* decision as follows:
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> > The [United States Supreme] Court began its analysis by addressing a separate, but antecedent, question: "whether counsel in fact consulted with the defendant about an appeal." The Court defined "consult" as "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." The Court continued[:]
> >
> > > If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure

> to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?
>
> [*Roe*, at 478, 120 S.Ct. 1029]. The Court answered the question by holding:
>
> > [C]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.
>
> [*Id.* at 480, 120 S.Ct. 1029]. A deficient failure on the part of counsel to consult with the defendant does not automatically entitle the defendant to reinstatement of his or her appellate rights; the defendant must show prejudice. The [*Roe*] Court held that "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." [*Id.*]

Commonwealth v. Carter, 21 A.3d 680, 683 (Pa.Super. 2011) (quoting Commonwealth v. Gadsden, 832 A.2d at 1086-87).

That appellate counsel did not consult with Defendant after receipt of the Superior Court's May 3, 2011 decision is clear. Counsel's letter of May 5, 2011, while advising Defendant of the decision, did not examine the merits or disadvantages of taking an appeal. More importantly, though recommending that an appeal be taken, counsel never sought to discover Defendant's wishes in

this regard. *See also* Touw, 781 A.2d at 1254 (finding that counsel's discussion with appellant's parents after sentencing, as well as a letter sent to appellant's stepfather, did not satisfy the consultation requirements of Flores-Ortega, which requires that the consultation be made with defendant).

Having found that consultation within the meaning of Roe did not occur, we next turn to the second and subsidiary question posed in Roe: Was there a duty to consult. To establish a duty to consult, a defendant must "put[] forward or describe[] an issue raised upon direct appeal that would rise above mere frivolity upon further review," Bath, 907 A.2d at 623, or prove that the circumstances "reasonably demonstrated to counsel that he was interested in appealing." Carter, 21 A.3d at 683 (citation omitted).

In the instant case, Defendant has made no attempt to show that any issue which was raised with the Superior Court or which he intends to present to the Supreme Court rises above frivolity. Of the six issues Defendant presented to the Superior Court, four were deemed waived, one was found to be premature, and the sixth was determined to have no merit. It was incumbent upon Defendant to demonstrate to this court why Defendant's request to appeal such issues further would not be manifestly frivolous. *See* Bath, 907 A.2d at 624. (contrasting the frivolity of further review of issues already determined to

be meritless on direct appeal, with issues that had yet to receive appellate review). This Defendant has failed to do.

However, the second basis to sustain such a request, that this particular Defendant reasonably demonstrated to counsel that he was interested in appealing appears to have substance. On this issue, appellate counsel's May 5, 2011 letter to Defendant's father expressly stated that counsel was "shocked that the Superior Court did not grant your son a new trial in this matter" and advised that "it is our professional opinion that you should file a petition for allowance of appeal to the Pennsylvania Supreme Court." Immediately upon receipt of this letter, Defendant's father sought to contact counsel regarding this recommendation and left messages for counsel to return, but counsel failed to respond.

Moreover, Defendant himself testified with respect to appellate counsel that "he was my lawyer to help me get home" and that "they were going to fight for me. They were my lawyers. You know, that they were going to – from the sentencing through the whole process, that they will be my lawyers to file whatever needed to be filed," and that he wanted appellate counsel to take the appeal but was time barred from doing so by the time he received a copy of the Superior Court's decision. (N.T. 11/18/11, pp. 12, 36-39). Defendant's desire to have the appeal filed is further demonstrated by the legal research he undertook

on his own to pursue this appeal after receipt of the Superior Court's decision and the *pro se* filing he made on August 2, 2011. (N.T. 11/18/11, pp. 16-17, 29).

These circumstances – counsel's recommendation to take the appeal, Defendant's father's efforts to contact counsel which were ignored, and Defendant's expectations as expressed by Defendant and his parents to counsel that counsel would be aggressive in pursuing his appeal – all should have placed counsel on notice that Defendant was interested in appealing. Knowing this, counsel had an obligation to consult with Defendant, to discuss the advantages and disadvantages of filing an appeal, and to ascertain Defendant's desire to appeal. This, unfortunately, was never done, the result being an abdication by counsel of the duty to consult with Defendant, whose selfsame evidence supports the prejudicial effects of this breach by demonstrating that, but for counsel's breach of this duty to consult, there is a reasonable likelihood that Defendant would have timely appealed. Roe, 528 U.S. at 486 (noting that the prejudice inquiry is not wholly dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place).

CONCLUSION

Based on the record before us, we have concluded that Defendant should be permitted to exhaust his rights on direct appeal by reinstatement of his right to file a petition for allowance of appeal with the Pennsylvania Supreme Court *nunc pro tunc*. Given this outcome, Defendant's remaining claims will be dismissed without prejudice to his ability to raise them in a subsequent PCRA petition, such claims being premature while Defendant's right to continue his direct appeal remains pending. Commonwealth v. Seay, 814 A.2d 1240, 1241 (Pa.Super. 2003) (holding that a PCRA petition is premature and should be quashed where defendant's direct appeal is pending and has not yet been adjudicated) and Commonwealth v. Kubis, 808 A.2d 196, 198 n.4 (Pa.Super. 2002) (holding that the PCRA has no applicability until the judgment of sentence becomes final), *appeal denied*, 813 A.2d 839 (Pa. 2002).

BY THE COURT:

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P.J.