

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.) CR. I.D. NO.: 0104000035
)
 JOSE A. PENA,) SUPREME COURT NO. 658, 2011
)
 Defendant.)

Submitted: January 12, 2012
Decided: March 15, 2012

ORDER

By Order dated January 12, 2012, the Supreme Court of Delaware remanded this matter to this Court “for further fact-finding regarding whether the appellant consulted with his counsel following the imposition of sentence and whether he instructed his counsel to file an appeal on his behalf.”¹ The Court conducted a hearing on February 23, 2012, during which counsel for Mr. Pena advised the Court

¹ *Pena v. State*, No. 658-2011, at 2 (Del. January 12, 2012) (ORDER). The Supreme Court did not request a Report from this Court upon completion of the fact-finding process. Accordingly, the Court has set forth its findings in this Order which has been provided to the State’s counsel on appeal, defense counsel, the defendant and the Clerk of the Supreme Court of Delaware for such action as is deemed appropriate.

that: (a) he did not advise Mr. Pena of his right to appeal after his plea of guilty and immediate sentencing because he was of the clear impression that Mr. Pena wished to resolve his charges by plea and also because the Court imposed the minimum mandatory sentence for the charge to which Mr. Pena pleaded guilty; (b) he does not recall receiving, nor does his file contain, a letter from Mr. Pena expressing his desire to appeal the Court's sentence; and (c) he does not recall receiving a telephone call from Mr. Pena or a message that Mr. Pena had called following the sentencing in this matter. For his part, Mr. Pena advised the Court that he recalls sending a letter to Mr. Wilkinson (at the address he had been provided for the Public Defender's Office) advising Mr. Wilkinson of his desire to appeal the Court's sentence. Mr. Pena states that when he did not hear back from Mr. Wilkinson he wrote a letter to the Supreme Court of Delaware advising the Court of his intent to appeal this court's sentence. Upon a review of the Supreme Court's docket in this case, and the State's "Answer to Response to Notice to Show Cause," it does not appear that the Supreme Court received Mr. Pena's letter (assuming it was sent).

Following the hearing, this Court directed Mr. Wilkinson to perform a thorough search of all of his files and to inquire within his office to determine if Mr. Pena's letter to him may have been misplaced. While Mr. Wilkinson was satisfied that he had not received Mr. Pena's letter, the Court felt it appropriate, nevertheless,

to ensure that no one else within the Public Defender's Office had received it by mistake. Mr. Wilkinson's affidavit in response to the Court's request was received on March 13, 2012. In his affidavit, Mr. Wilkinson states that he did not locate any letter from Mr. Pena within his own office or within the Public Defender's Office. He also confirms that he has found no other indication within the Public Defender's Office "that Mr. Pena was attempting to contact [him]."

The Supreme Court of Delaware has, on occasion, remanded criminal cases to this Court "for re-sentencing[] so that [a defendant] may be given the opportunity to file a timely direct appeal."² In this case, however, the Supreme Court has directed that this Court engage in fact-finding to determine if Mr. Pena, in fact, consulted with Mr. Wilkinson regarding an appeal. The Court has completed that fact-finding and concludes that Mr. Pena did not consult with Mr. Wilkinson regarding an appeal. Mr. Wilkinson's testimony in this regard is persuasive. Moreover, Mr. Pena's testimony that he sent a letter to Mr. Wilkinson was vague and sounded much like his statement to the Supreme Court that he had sent a letter (never received) to that Court indicating his desire to appeal this Court's sentence. The Court finds it unlikely that both letters were sent and never received. Rather, the Court is satisfied that Mr. Pena attempted to file his appeal directly with the Supreme Court but simply missed his appeal

² *Guinn v. State*, 2008 WL 5150166 (Del. Aug. 1, 2008) (citation omitted).

deadline.

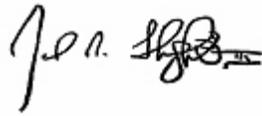
Although not directly requested to do so in the Supreme Court's Order of Remand, this Court has also considered whether Mr. Wilkinson had a duty to advise Mr. Pena of his right to appeal even if Mr. Pena did not express his desire to appeal. The Court finds that no such obligation was implicated in this case. As Mr. Wilkinson advised the Court during the hearing, he was of the clear impression that Mr. Pena desired to plead guilty and thereby put "an end to judicial proceedings."³ Under these circumstances, Mr. Wilkinson correctly determined that no "rational defendant" would want to appeal this Court's sentence, particularly given that the sentence imposed was the minimum mandatory sentence that defendant could receive for Trafficking in Cocaine.⁴

Based on the foregoing, this Court finds that: (1) Mr. Wilkinson did not have a constitutional duty to consult with Mr. Pena regarding an appeal under the circumstances presented here; and (2) Mr. Pena did not "reasonably demonstrate to [Mr. Wilkinson] that he was interested in appealing."⁵

³ See *Burkette v. State*, 2007 WL 2123778 (Del. July 25, 2007) (citation omitted).

⁴ *Id.*

⁵ *Id.*

A handwritten signature in black ink, appearing to read "J.R. Slights, III". The signature is written in a cursive, somewhat stylized font.

Joseph R. Slights, III, Judge

cc: Cathy L. Howard, Clerk of the Supreme Court
Paul Wallace, Deputy Attorney General
Ralph D. Wilkinson, IV, Assistant Public Defender
Mr. Jose A. Pena