

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DAVID W. DELGADO

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1073 MDA 2012

Appeal from the Order Entered May 11, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0006063-2001

BEFORE: BOWES, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.:

Filed: February 5, 2013

Appellant, David W. Delgado, appeals from the order entered in the Berks County Court of Common Pleas, denying his petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm and grant counsel's petition to withdraw.

The PCRA court summarized the relevant facts and procedural history of this case as follows:

On August 4, 2005, [Appellant] entered a negotiated guilty plea to one count of Murder of the Third Degree, 18 Pa.C.S.A. § 2502(c), and two counts of Aggravated Assault, 18 Pa.C.S.A. § 2702(a)(1). [The] court sentenced [Appellant] to a period of incarceration of twenty years to forty years on the charge of Murder of the Third Degree and ten years to twenty years on the Aggravated Assault

¹ 42 Pa.C.S.A. §§ 9541-9546.

charges. All three sentences were concurrent to each other. On each sentence order [the] court provided that [Appellant] was to receive credit on his sentence as determined by the Bureau of Corrections in accordance with the law.

On March 29, 2010, [Appellant] filed a Petition for Credit for Imprisonment While in Custody Prior to Sentence. [The] court denied the petition. [Appellant] filed an appeal. The Superior Court affirmed on November 29, 2010. The Superior Court found that the appropriate action that [Appellant] should have taken to address an alleged error in the computation of his sentence by the Bureau of Corrections was to file an original action in the Commonwealth Court challenging the Bureau's computation.

(PCRA Court Opinion, dated August 10, 2012, at 1-2). On November 3, 2011, Appellant filed a counseled PCRA petition, requesting the court award him credit for time he spent in federal prison. The court held a hearing before denying Appellant's petition on May 11, 2012. Appellant timely filed a notice of appeal on Monday, June 11, 2012. The court ordered Appellant to file a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b), which Appellant timely filed.

As a preliminary matter, counsel has filed a petition to withdraw.²

"Before an attorney can be permitted to withdraw from representing a

² In the context of a PCRA petition and request to withdraw, the appropriate filing is a "no-merit" letter/brief. *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988); *Commonwealth v. Finley*, 550 A.2d 213 (1988). Typically, an *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) brief provides an appellant greater protection and when mistakenly filed in the PCRA context, we can accept that brief in *lieu* of a (Footnote Continued Next Page)

petitioner **under the PCRA**, Pennsylvania law requires counsel to file and obtain approval of a 'no-merit' letter pursuant to the mandates of **Turner/Finley.**" *Commonwealth v. Karanicolas*, 836 A.2d 940, 947 (Pa.Super. 2003) (emphasis in original).

[C]ounsel must...submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa.Super. 2007). Counsel must also send to the petitioner a copy of the "no-merit" letter or brief and motion to withdraw and advise the petitioner of his right to proceed *pro se* or with new counsel. *Id.* "Substantial compliance with these requirements will satisfy the criteria." *Karanicolas, supra.*

Instantly, counsel filed a **Turner/Finley** brief on appeal (notwithstanding its designation as an **Anders** brief) and a motion to withdraw as counsel. Counsel listed the issue Appellant wished to raise and thoroughly explained why the issue merits no relief. Counsel sent Appellant a copy of the brief filed on appeal, a copy of counsel's petition to withdraw, (Footnote Continued) _____

Turner/Finley letter. *See, e.g., Commonwealth v. Fusselman*, 866 A.2d 1109, 1111 n.3 (Pa.Super. 2004), *appeal denied*, 584 Pa. 691, 882 A.2d 477 (2005) (stating Superior Court can accept **Anders** brief in *lieu* of **Turner/Finley** letter, where PCRA counsel seeks to withdraw on PCRA appeal). Instantly, counsel designated the brief on appeal as an **Anders** brief. While the brief has some attributes of an **Anders** brief, it is largely a **Turner/Finley** brief and will be treated as one.

and a statement advising Appellant of his right to proceed *pro se* or with private counsel. Thus, counsel has substantially complied with the **Turner/Finley** requirements. *See Karanicolas, supra*. Accordingly, we proceed to an independent evaluation. *See Commonwealth v. Porter*, 556 Pa. 301, 310, 728 A.2d 890, 894 (1999) (stating appellate court must conduct independent analysis and agree with counsel that appeal is frivolous).

As Appellant has filed neither a *pro se* brief nor a counseled brief with new counsel, we will review the issues raised in the existing appellate brief:

DID THE [PCRA] COURT ERR IN DENYING APPELLANT'S
POST CONVICTION COLLATERAL RELIEF PETITION?

(Appellant's Brief at 5).

Appellant claims he should be awarded credit for certain time he was incarcerated in federal prison and is serving an illegal sentence due to the time credit discrepancy. Counsel nevertheless observes that Appellant's judgment of sentence became final in 2005, whereas Appellant filed his PCRA petition in 2011. Counsel concludes Appellant's petition was untimely and did not qualify for any of the PCRA timeliness exceptions. We agree.

The timeliness of a PCRA petition is a jurisdictional requisite. **Commonwealth v. Hackett**, 598 Pa. 350, 956 A.2d 978 (2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 2772, 174 L.Ed.2d 277 (2009). Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. **Commonwealth v. Robinson**, 575 Pa. 500, 508, 837 A.2d

1157, 1161 (2003). The PCRA requires a petition, including a second or subsequent petition, to be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment is deemed final “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review.” 42 Pa.C.S.A. § 9545(b)(3).

Generally, to obtain merits review of a PCRA petition filed more than one year after a petitioner’s sentence became final, the petitioner must allege and prove at least one of the three timeliness exceptions. **See** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). To invoke an exception, the petitioner must allege and prove:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). “[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not

filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." ***Commonwealth v. Gamboa-Taylor***, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000); 42 Pa.C.S.A. § 9545(b)(2).

Instantly, Appellant pled guilty to murder and related offenses on August 4, 2005. He did not file a direct appeal. Therefore, Appellant's judgment of sentence became final on September 3, 2005, after the time for seeking review with this Court expired. Appellant filed his current petition in November 2011, over five years too late. Appellant's petition attempts to frame his issue as implicating an illegal sentence (on the grounds that he was improperly denied time credit), but legality of sentence issues are still subject to the PCRA's time restrictions. ***See Commonwealth v. Fahy***, 558 Pa. 313, 737 A.2d 214 (1999). The petition does not attempt to invoke a timeliness exception. As a result, the petition is untimely, and the court correctly concluded it lacked jurisdiction to consider it. Accordingly, we affirm the order denying PCRA relief and grant counsel's petition to withdraw.

Order affirmed; petition to withdraw granted.