

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

FRANK FLUELLEN

Appellant

No. 1086 EDA 2013

Appeal from the PCRA Order March 8, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0210662-2001

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED DECEMBER 03, 2013

Appellant, Frank Fluellen, appeals *pro se* from the order entered March 8, 2013 dismissing as untimely his third petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.¹

A prior panel of this Court summarized the relevant facts and procedural history of this case as follows.

[On July 26, 2002, Appellant] was convicted by a jury of second degree murder, two counts of robbery, aggravated assault, kidnapping, criminal conspiracy and possession of an instrument of

* Former Justice specially assigned to the Superior Court.

¹ We note that the Commonwealth filed its appellate brief late, on October 10, 2013.

crime.^[1] These convictions stemmed from the robbery of Marie's Variety Store in Philadelphia, and the related shooting of the store manager, Skirvy Powell, and shooting death of the store owner, Asley Espuet. Involved in the robbery were [Appellant], Robert Holloday, James McIntosh, Jermaine Williams, Travis Hall, and several other men.

[That same day, Appellant] was sentenced to life imprisonment for the murder of Espuet, and to lesser sentences for the convictions involving Powell, to run consecutive to each other, but concurrent to the term of life imprisonment for murder.

^[1] 18 Pa.C.S.A. §§ 2502, 3701, 2702, 2901, 903, and 907, respectively.

Commonwealth v. Fluellen, 847 A.2d 756 (Pa. Super. 2004) (unpublished memorandum) (***Fluellen I***).

Appellant filed a timely notice of appeal, and on January 30, 2004, a panel of this Court affirmed Appellant's judgment of sentence. ***Id.*** Appellant did not file a petition for *allocatur* with our Supreme Court. Thereafter, on August 20, 2004, Appellant filed a timely *pro se* PCRA petition, his first. The PCRA court subsequently appointed Richard Hoy, Esquire (Attorney Hoy) to represent Appellant. On October 13, 2006, Attorney Hoy filed a ***Turner/Finley***² letter requesting leave to withdraw and indicating that there were no meritorious issues to be raised on Appellant's behalf.

² ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

On May 7, 2007, the PCRA court issued notice of its intent to dismiss Appellant's petition, pursuant to Pa.R.Crim.P 907. Thereafter, on June 5, 2007, the PCRA court dismissed Appellant's petition and granted Attorney Hoy permission to withdraw. On October 29, 2007, Appellant filed a second *pro se* PCRA petition, seeking the reinstatement of his appellate rights from the dismissal of his PCRA petition. On October 28, 2008, the PCRA court reinstated Appellant's appeal rights *nunc pro tunc*. Thereafter, on November 25, 2008, the PCRA court sent Appellant a letter advising him that, in order to be timely, his appeal must be filed no later than November 27, 2008. Appellant, however, failed to file an appeal with this Court until December 9, 2008.

Following multiple procedural delays and several changes in representation, the PCRA court inexplicably appointed Dennis Turner, Esquire (Attorney Turner) to represent Appellant on February 1, 2010. On June 1, 2010, Attorney Turner filed a Pa.R.A.P. 1925(b) concise statement on Appellant's behalf. Several supplemental Rule 1925(b) statements and addendums followed, the last of which was filed on December 10, 2010. On September 2, 2011, the PCRA court filed its Rule 1925(a) opinion, concluding that all of Appellant's claims were meritless. Thereafter, on October 5, 2012, a panel of this Court quashed Appellant's appeal as

untimely. **See Commonwealth v. Fluellen**, 62 A.3d 450 (Pa. Super. 2012) (unpublished memorandum) (**Fluellen II**).³

On November 16, 2012, Appellant filed a third *pro se* PCRA petition. On January 7, 2013, the PCRA court issued notice of its intent to dismiss Appellant's petition, pursuant to Rule 907. Appellant filed a *pro se* response to the PCRA court's Rule 907 notice on January 24, 2013. Thereafter, on March 8, 2013, the PCRA court entered an order dismissing Appellant's third petition as untimely. This timely appeal followed on April 5, 2013.⁴

On appeal, Appellant raises the following issue for our review.

[1.] Whether Appellant's Sixth and Fourteenth Amendment rights were violated, entitling him to *Nunc Pro Tunc* reinstatement of his [a]ppellate rights when his counsel of record abandoned him[?]

Appellant's Brief at 3 (emphasis added).

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." **Commonwealth v. Edmiston**, 65 A.3d 339, 345 (Pa. 2013) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of

³ Our review of the record in this matter reveals that this Court has affirmed the dismissal of Appellant's request for PCRA relief in another case. **See Commonwealth v. Fluellen**, 1492 EDA 2012 (Pa. Super 2013), *petition for allowance of appeal pending*, 490 EAL 2013 (Pa. 2013) (**Fluellen III**).

⁴ Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

record, viewed in the light most favorable to the prevailing party at the PCRA court level.” **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). “[T]his Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

Before we may address the merits of a PCRA petition, we must first consider the petition’s timeliness because it implicates the jurisdiction of both this Court and the PCRA court. **Commonwealth v. Williams**, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). We may raise issues concerning our appellate jurisdiction *sua sponte*. **Commonwealth v. Patterson**, 940 A.2d 493, 497 (Pa. Super. 2007), *appeal denied*, 960 A.2d 838 (Pa. 2008). “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.” **Id.** The PCRA “confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]” **Commonwealth v. Watts**, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). This is to “accord finality to the collateral review process.” **Id.** “A petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of

the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.” ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009).

Section 9545 provides, in relevant part, as follows.

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

...

42 Pa.C.S.A. § 9545(b).

In the instant matter, Appellant was sentenced to an aggregate term of life imprisonment on July 26, 2002, and this Court affirmed his judgment of sentence on January 30, 2004. **See *Fluellen I, supra***. Thus, Appellant's judgment of sentence became final on February 29, 2004, when the 30-day period for Appellant to file a petition for *allocatur* with our Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3). Thus, Appellant had until March 1, 2005 to file a timely petition.⁵ **Id.** § 9545(b)(1). Appellant's instant petition, his third, was filed on November 16, 2012, nearly eight years and nine months after his judgment of sentence became final. Accordingly, Appellant's petition is patently untimely, and Appellant must plead and prove one of the three enumerated statutory exceptions to the time-bar.

Our review of Appellant's petition and his 14-page *pro se* appellate brief reveals that Appellant has neither alleged nor proven a cognizable time-bar exception to the PCRA time-bar. Notably, Appellant's brief does not contain any citation whatsoever to Section 9545. Without a pled and successfully proven exception to the time-bar, we cannot address the merits of the arguments raised. ***Commonwealth v. Perrin***, 947 A.2d 1284, 1285 (Pa. Super. 2008).

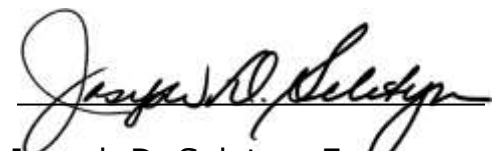
⁵ We note that 2004 was a leap year, and there was no February 29th in 2005. Thus, Appellant had until March 1, 2005 to file a timely PCRA petition.

Moreover, we emphasize that, “[a]lthough this Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit upon the appellant.” ***Commonwealth v. Adams***, 882 A.2d 496, 498 (Pa. Super. 2005) (citation omitted). Nor does it entitle him to have this Court advocate on his behalf. ***Commonwealth v. Hakala***, 900 A.2d 404, 407 (Pa. Super. 2006) (stating “[i]t is not this Court’s function or duty to become an advocate for the Appellant[.]”), *appeal denied*, 900 A.2d 1288 (Pa. 2006). “To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing.” ***Adams, supra*** (citations omitted).

Accordingly, having found that Appellant’s *pro se* PCRA petition was untimely filed and that no cognizable exception to the time-bar applies, we discern no error on the part of the PCRA court in dismissing said petition as untimely. Therefore, we affirm the March 8, 2013 order of the PCRA court.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013