

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JOSEPH HOWELL

Appellant

No. 1105 WDA 2012

Appeal from the PCRA Order of June 20, 2012  
In the Court of Common Pleas of Allegheny County  
Criminal Division at Nos.: CP-02-CR-0011830-2002  
CP-02-CR-0013879-2002

BEFORE: ALLEN, J., WECHT, J., and STRASSBURGER, J.\*

MEMORANDUM BY WECHT, J.:

**FILED AUGUST 23, 2013**

Joseph Howell ("Appellant") appeals *pro se* from the June 20, 2012 order denying his petition for relief under the Post-Conviction Relief Act ("PCRA").<sup>1</sup> We affirm.

The PCRA court summarized the case history as follows:

[Appellant] was charged with Homicide, 18 Pa.C.S.A. § 2501, Robbery, 18 Pa.C.S.A. § 3701, Aggravated Assault, 18 Pa.C.S.A. § 2702, Unlawful Restraint, 18 Pa.C.S.A. § 2902, and Criminal Conspiracy, 18 Pa.C.S.A. § 903. On January 21, 2004, the jury found [Appellant] guilty of Second Degree Murder, Robbery, Unlawful Restraint, and Criminal Conspiracy.

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> 42 Pa.C.S.A. §§ 9541-46.

On March 24, 2004, [Appellant] was sentenced to serve a period of incarceration of his natural life, plus a consecutive period of incarceration of not less than ten (10) years nor more than twenty (20) years.<sup>1</sup>

<sup>1</sup> In an Order of Court dated June 6, 2012, the sentence imposed at Count[] 1 (Robbery) was vacated, as the Robbery conviction merged with the conviction for Second Degree Murder for purposes of sentencing.

A direct appeal was filed. On June 29, 2005, the Superior Court affirmed the judgment of sentence in a Memorandum Opinion. A subsequent Petition for Allowance of Appeal was denied by the Supreme Court on December 5, 2005.

On January 31, 2006, [Appellant] filed his first Petition under the Post Conviction Relief Act. Counsel was appointed and an Amended Petition was filed alleging ineffective assistance of counsel. The Commonwealth filed an Answer. On June 28, 2006, an Order of Court was issued dismissing [Appellant's] Petition without a hearing.

As appointed counsel did not receive a copy of this Court's June 28, 2006 Order of Court in time to file a timely Notice of Appeal, [Appellant's] appellate rights were reinstated in an Order of Court dated August 25, 2006.

In an Order and Memorandum Opinion dated August 28, 2007, the Superior Court affirmed the Order dismissing the Petition, but remanded the matter "for the sole purpose of vacating the sentence for robbery", as the robbery merged with the conviction for Second Degree Murder for sentencing purposes (See Footnote #1).

On April 30, 2012, [Appellant] filed his second Petition under the Post Conviction Relief Act. A Notice of Intention to Dismiss was issued on May 21, 2012 on the grounds that the Petition is time-barred. On June 20, 2012, after reviewing the *pro se* Petition and the entire court record, the Court dismissed the Petition as time-barred.

[Appellant] had filed a *pro se* Notice of Appeal.<sup>[2]</sup>

Trial Court Opinion ("T.C.O."), 7/20/2012, at 1-2.

Appellant raises three issues on appeal:

1. Does [Appellant] have an enforceable right to the effective assistance of counsel in Post-Conviction Relief Act Proceedings[?]
2. Did the PCRA Court abuse its discretion by failing to comply with the Pennsylvania Rule of Criminal Procedure 905 when it denied Howell an opportunity to file an Amended PCRA petition?
3. Does [Appellant] have a right under the Pennsylvania Constitution to seek redress for violation of his right to effective assistance of trial counsel in the Pennsylvania Courts?

Appellant's Brief at 4.

Before reaching Appellant's issues, we must determine jurisdiction. The trial court found that Appellant's petition was untimely pursuant to 42 Pa.C.S.A. § 9545(b)(1) (stating that a PCRA petition must be filed within one year of the date a judgment of sentence becomes final). T.C.O. at 2. As the timeliness of a PCRA petition is jurisdictional, we must first address that issue. ***See Commonwealth v. Albrecht***, 994 A.2d 1091, 1093 (Pa. 2010) ("The PCRA's time restrictions are jurisdictional in nature.").

The PCRA sets forth the following time limit:

(b) Time for filing petition.--

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<sup>2</sup> The trial court did not order, and Appellant did not file, a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

(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.

\* \* \*

(3) For purposes of this subchapter, a judgment becomes 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 the review.

42 Pa.C.S.A. § 9545(b).

Here, Appellant was sentenced on March 24, 2004. However, upon appeal of his first PCRA petition, we vacated the robbery sentence. Because robbery should have merged with the murder conviction for sentencing, Appellant's sentence was illegal. *Commonwealth v. Howell*, 1791 WDA 2006, Slip. Op. at 8-10 (Pa. Super. Aug. 28, 2007). We remanded the case for the sole purpose of vacating the robbery sentence. Appellant filed the instant PCRA petition after we ordered vacatur of his robbery sentence, but before the trial court imposed the new judgment of sentence. For reasons

unknown, the court did not enter a new judgment of sentence until June 6, 2012. The question is whether finality for the purposes of the PCRA is determined from Appellant's first or second judgment of sentence.

In *Commonwealth v. Lesko*, 15 A.3d 345 (Pa. 2011), our Supreme Court addressed a similar issue. In that case, the appellant was granted sentencing phase relief by the United States Court of Appeals for the Third Circuit in response to the appellant's federal petition for a writ of *habeas corpus*. *Lesko*, 15 A.3d at 357. The trial court held a second sentencing proceeding. *Id.* On remand, the appellant filed a direct appeal from his new sentence, which sentence was affirmed by our Supreme Court. The appellant then filed a PCRA petition that raised issues arising from both his original conviction and his new sentence. The PCRA court granted relief and ordered a new trial. *Id.* at 358. The Commonwealth appealed, contending that the claims relating to the original conviction were time-barred. *Id.* at 358-59. The appellant asserted that his judgment of sentence was not final until the United States Supreme Court denied his petition for *certiorari* following his direct appeal of his second sentence. *Id.* at 359.

Our Supreme Court viewed the issue as whether the limited relief afforded by the federal courts, which ordered only a new sentencing hearing, operated to reopen the judgment of guilt. *Id.* at 360. The Court held:

The new sentencing proceedings . . . [are] sufficiently distinct from the initial sentencing proceeding that collateral review of issues specific to the resentencing is consistent with the plain intent and purpose of the PCRA. But, the calculus is entirely different when the [appellant] seeks to invoke the new

sentencing judgment as a basis to pursue, as of right, issues that do not arise from the resentencing proceeding. . . . [A] limited grant of federal *habeas* sentencing relief does not give rise to a “right” to full-blown serial PCRA review of a trial whose result (conviction) had long been final.

*Id.* at 362. Because the appellant’s *habeas* relief was only granted with regard to sentencing, the Court determined that issues arising from his original conviction were time-barred. The judgment of sentence was “final for all purposes **except** for that part of the final judgment that was disturbed by the federal *habeas* proceedings.” *Id.* at 366 (emphasis in original).

The remand in the instant case was for the sole purpose of vacating the robbery sentence. Following appellate review of the merits of Appellant’s PCRA, we affirmed all other aspects of his judgment of sentence and resolved his ineffective assistance of counsel claims on the merits. The Pennsylvania Supreme Court denied Appellant’s petition for allowance of appeal on March 25, 2008. Applying *Lesko* to this case, the only aspect of Appellant’s judgment of sentence that was not final following the expiration of the time to file a writ of *certiorari* with the United States Supreme Court was the vacatur of the robbery sentence. Appellant’s PCRA petition primarily raises issues regarding effectiveness of counsel. Appellant’s PCRA petition does not raise issues related to the robbery sentence and, therefore, it is facially untimely.

Appellant’s petition would not be time-barred if he were able to plead and prove one of the exceptions to the timeliness requirement. 42 Pa.C.S.A.


§ 9545(b)(1). In his petition, Appellant alleges that a recent United States Supreme Court case provided that Appellant had the right to effective assistance of PCRA counsel. PCRA Petition, 4/30/2012, at 2. However, it is not sufficient simply to cite a case. Appellant must plead and prove that one of the exceptions applies. **Commonwealth v. Lark**, 746 A.2d 585, 588 (Pa. 2000). Appellant's bald assertion that **Martinez v. Ryan**, 132 S.Ct. 1309 (2012), applies is not sufficient to prove that **Martinez** affords a newly recognized constitutional right. 42 Pa.C.S.A. § 9545(b)(1)(iii). Even if Appellant's petition sufficiently pled this exception, Appellant's argument would have no merit, as we have already held that:

[w]hile **Martinez** represents a significant development in federal *habeas corpus* law, it is of no moment with respect to the way Pennsylvania courts apply the plain language of the time bar set forth in section 9545(b)(1) of the PCRA.

**Commonwealth v. Saunders**, 60 A.3d 162, 165 (Pa. Super. 2013).

Appellant's petition is untimely. We are without jurisdiction to consider the merits of his appeal. Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 8/23/2013