

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JOHN ROBERT PAYNE, SR.

Appellant

No. 1168 WDA 2013

Appeal from the PCRA Order January 2, 2013
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0001639-2006

BEFORE: BOWES, J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

FILED: December 10, 2013

John Robert Payne, Sr., appeals from the order dismissing his second, *pro se* petition under the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"). We affirm.

On January 18, 2007, a jury found Payne guilty of aggravated indecent assault, indecent assault, corruption of minors and endangering the welfare of children, charges that stemmed from Payne's molestation of his daughter's friend when she was between nine and sixteen years old. ***Commonwealth v. Payne***, 964 A.2d 443 (Pa. Super. 2008) (unpublished memorandum). On May 7, 2007, the trial court sentenced Payne to a term of five to ten years' imprisonment for aggravated indecent assault, with a consecutive sentence of nine to twenty-four months' imprisonment for corruption of minors, and a period of five years' probation for endangering

the welfare of children. Payne filed a timely appeal to this Court in which counsel sought to withdraw her representation pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981). Upon review, we affirmed Payne's judgment of sentence and granted counsel's motion to withdraw.

On November 5, 2008, Payne filed his first, *pro se* petition under the PCRA. The PCRA court appointed counsel, who ultimately filed a ***Turner/Finley*** "no-merit" letter and petitioned to withdraw his representation. On January 12, 2009, the PCRA court issued its Pa.R.Crim.P. 907 notice of intent to dismiss. Payne did not file any objection to the Rule 907 notice, and, by order dated February 2, 2009, the PCRA court dismissed his petition.¹ Payne did not appeal that order.²

¹ The PCRA court granted counsel's motion to withdraw by order dated January 14, 2009.

² Following the dismissal of his first PCRA petition, Payne sent a letter to the court stating that he was "in need of immediate legal assistance and attention." Payne Letter to Court, 3/9/10. The court treated this letter as a motion for appointment of counsel and, by order dated March 16, 2010, the court appointed the Erie County Public Defender's Office to represent Payne's interests and to "take whatever action is deemed appropriate in its professional opinion." Trial Court Order, 3/16/10.

No further action was taken in this matter until September 2, 2010, when the court issued an order appointing Nicole Sloane, Esquire, as counsel for Payne. The PCRA court explained the reason for Attorney Sloane's appointment:

At that time, a number of sexual offense cases which resulted in convictions on the basis of the questionable testimony of a
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On November 13, 2012, Payne filed a second, *pro se* PCRA petition, in which he alleged that appellate counsel “renewed” on her representation by filing an **Anders** brief and that trial counsel was ineffective for failing to litigate a **Miranda** violation. On November 27, 2012, the PCRA court issued a Rule 907 notice, concluding that Payne’s claims were untimely, waived and/or previously litigated. Payne filed objections on December 17, 2012, but the PCRA court formally dismissed his petition on January 2, 2013.

Payne filed a timely notice of appeal and Rule 1925(b) statement on January 22, 2013. The PCRA court filed its Rule 1925(a) opinion on August 2, 2013.

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forensic nurse, Rhonda Henderson, R.N., came under the scrutiny of the [Erie County] District Attorney’s Office. The defendants, in what became known as the “Henderson” cases, were notified by the [DA that] post conviction filings challenging their convictions would be considered. Attorneys were appointed upon request by the defendants to investigate the cases and prepare appropriate . . . pleadings. Though counsel was appointed for [Payne], it was determined [that Henderson] was not a factor in [his] case.

PCRA Court Opinion, 11/27/12, at 4 n.2.

Attorney Sloane did not take any formal action on Payne’s behalf. However, the certified record contains a copy of a letter from Attorney Sloane to the court in which she indicated that she had reviewed Payne’s file and spoken to Payne’s trial counsel as well as others recommended by Payne. She concluded that Payne had no basis for relief. Despite this conclusion, Attorney Sloane never formally withdrew from her representation of Payne. However, by letter dated October 5, 2011, Payne informed Attorney Sloane that he was proceeding *pro se* in his case. Accordingly, like the PCRA court, we will proceed as though Payne is not otherwise represented by counsel.

We begin by noting that Payne's appellate brief does not contain a statement of questions involved, as required by Pa.R.A.P. 2116.³ Issues not presented in the statement of questions involved are usually waived. Pa.R.A.P. 2116(a) ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby."); **Phillips v. Selig**, 959 A.2d 420 (Pa. Super. 2008). While failure to include an issue in a Rule 2116 statement may be overlooked where the omission does not impede our review, **In re N.C.**, 909 A.2d 818, 822 n.4 (Pa. Super. 2006), citing **Savoy v. Savoy**, 641 A.2d 596, 598 (Pa. Super. 1994), here that is not the case. The argument section of Payne's brief is devoid of section headings and rife with misused words, confusing phrasing and dubious applications of scant authority. Accordingly, we are constrained to conclude that Payne has waived all issues on appeal.⁴

Even if Payne's brief were not deficient, he would not be entitled to relief, as his PCRA petition is patently untimely. A PCRA petition, including a second or subsequent petition, must be filed within one year of the date the underlying judgment of sentence becomes final. **See** 42 Pa.C.S.A. §

³ Payne's brief also lacks a Pa.R.A.P. 2114 statement of jurisdiction, the text of the order or other determination in question pursuant to Pa.R.A.P. 2115, and a summary of the argument as required by Pa.R.A.P. 2118.

⁴ This Court is willing to liberally construe materials filed by a *pro se* appellant; however, Payne is not entitled to special treatment by virtue of the fact that he lacks legal training. **Commonwealth v. Maris**, 629 A.2d 1014, 1017 n.1 (Pa. Super. 1993).

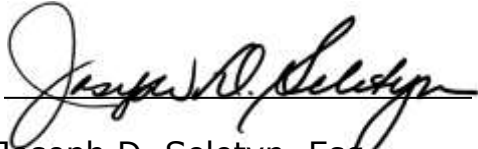
9545(b)(1); **see also Commonwealth v. Bretz**, 830 A.2d 1273, 1275 (Pa. Super. 2003). A judgment is deemed final “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review.” 42 Pa.C.S.A. § 9545(b)(3); **see also Commonwealth v. Pollard**, 911 A.2d 1005, 1007 (Pa. Super. 2006). Here, Payne’s judgment of sentence became final on November 17, 2008, when his time to file a petition for allowance of appeal with the Pennsylvania Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3). Thus, Payne had one year from that date, or until November 17, 2009, to file a timely PCRA petition. **See** 42 Pa.C.S.A. § 9545(b). Payne did not file the instant petition, his second, until November 13, 2012, nearly three years too late. Accordingly, the PCRA court had no jurisdiction to entertain Payne’s petition unless he pleaded and proved one of the three statutory exceptions to the time bar. **See** 42 Pa.C.S.A. § 9545(b). He did not do so and, as such, the PCRA court properly dismissed his petition as untimely filed.⁵

Order affirmed. Application for Relief Denied.⁶

⁵ The PCRA court also correctly concluded that Payne’s claims have all been previously litigated or are subject to waiver pursuant to 42 Pa.C.S.A. § 9544. **See** Rule 907 Notice of Intent to Dismiss, 12/27/12, at 7-9.

⁶ On December 2, 2013, Payne filed an application for relief, complaining that the Commonwealth had not filed its brief by the due date. Payne seemed to be concerned that he would not have sufficient time to respond to
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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: 12/10/2013

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the Commonwealth's brief prior to our making a decision in this matter. However, the Commonwealth never filed a brief and, as such, Payne has not been prejudiced.