

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TYRONE FLUKERS,	:	
	:	
Appellant	:	No. 1232 WDA 2012

Appeal from the PCRA Order Entered July 9, 2012,
In the Court of Common Pleas of Allegheny County,
Criminal Division, at No. CP-02-CR-0000895-2007.

BEFORE: SHOGAN, LAZARUS and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED MAY 29, 2013

Appellant, Tyrone Flukers, appeals *pro se* from the order denying his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

We summarize the somewhat peculiar procedural history of this case as follows. Appellant was charged by information, filed in the Court of Common Pleas on March 19, 2007, with one count each of kidnapping, terroristic threats, false imprisonment, recklessly endangering another person, simple assault, criminal conspiracy, escape, and unlawful restraint in relation to his abduction of his girlfriend. On November 5, 2007, Appellant pled guilty to kidnapping, simple assault, and escape. In exchange for the guilty plea, the Commonwealth withdrew a total of five of the counts in the

*Retired Senior Judge assigned to the Superior Court.

information. The plea agreement specified that Appellant would receive a sentence of incarceration of five to twelve years. Accordingly, on November 5, 2007, the trial court sentenced Appellant, pursuant to the plea agreement, to a term of incarceration of five to twelve years for the kidnapping conviction. The trial court sentenced Appellant to “no further penalty” on the convictions of simple assault and escape.

On December 19, 2007, Appellant filed a *pro se* motion seeking reconsideration of his sentence. The trial court entered an order denying the motion for reconsideration, indicating that it was not filed in a timely manner.

On June 4, 2008, Appellant filed a *pro se* PCRA petition and the PCRA court appointed counsel to represent Appellant. Appointed counsel then filed an amended PCRA petition. In addition, Appellant filed a *pro se* amended PCRA petition. On April 28, 2009, Appellant appeared before the PCRA court and presented an oral motion to withdraw his PCRA petition, which the PCRA court granted.¹

¹ Specifically, in its order dated April 28, 2009, and filed on May 11, 2009, the PCRA court stated the following:

[A]fter a hearing, with counsel for [Appellant] present, on [Appellant’s] oral Motion to Withdraw PCRA Petition, and conducting a colloquy and determining that [Appellant’s] request to withdraw the instant PCRA Petition was voluntary and that [Appellant] understood the ramifications and consequences of his action, said Motion to Withdraw PCRA Petition is hereby GRANTED.

Subsequently, on May 29, 2009, Appellant filed a "Motion for Reconsideration and Hearing Nunc Pro Tunc" referencing his December 2007 motion for reconsideration of sentence. On June 12, 2009, the trial court entered an order vacating its January 22, 2008 order, and granted Appellant twenty days within which to file an amended motion for reconsideration of sentence. The Commonwealth filed a motion for reconsideration of the June 12, 2009 order, asserting that its effect was to grant Appellant reinstatement of his direct appeal rights, in spite of Appellant having withdrawn his PCRA petition, and asserting that the trial court lacked jurisdiction to vacate its January 22, 2008 order.

On June 25, 2009, Appellant filed an amendment to his motion for reconsideration of sentence. In an order dated September 11, 2009, the trial court denied Appellant's amended motion.² Appellant did not file a direct appeal.

On March 13, 2012, Appellant filed, *pro se*, a "Writ of Error Coram Nobis." The PCRA court concluded that the *pro se* filing was a PCRA petition

Order, 4/28/09, at 1.

² The trial court's order of September 11, 2009, states as follows:

[A]fter having received and reviewed [Appellant's] Amended Motion for Reconsideration and after review of the plea and sentencing transcript dated 11/5/2007, it is hereby ORDERED: that [Appellant's] Motion is DENIED.

Order, 9/11/09, at 1.

and appointed counsel to represent Appellant. Appointed counsel then filed a "no merit" letter and motion seeking to withdraw pursuant to **Turner/Finley**.³ The PCRA court then granted appointed counsel's motion to withdraw and issued notice to Appellant of its intent to dismiss the PCRA petition.

On June 21, 2012, Appellant filed a *pro se* response to appointed counsel's "no merit" letter. On July 9, 2012, the PCRA court dismissed the PCRA petition and Appellant filed a timely *pro se* notice of appeal.

In an order dated August 15, 2012, and filed on August 17, 2012, the PCRA court ordered Appellant to file a statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant failed to file a Rule 1925(b) statement. On November 14, 2012, the PCRA court filed a statement in lieu of opinion pursuant to Pa.R.A.P. 1925(a).

In his *pro se* appellate brief, Appellant presents the following issues, which we reproduce verbatim:

Was my trial counsel ineffective for reason of not bringing forth the information of the victim to the court at the time of judgement? That would have changed the outcome of the judgement? Yes! Strickland v. Washington, 466, U.S. 686, 104 S.Ct. 80 L. Ed 2nd 674-1984. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963). And forcing appellant to take the guilty plea which if that was presented to

³ **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

the court at the time of the plea it would have shown the witnesses credibility would have been impeachable.

Was my P.C.R.A. counsel ineffective for not following up with the information, that was available for the impeachment of credibility of witness? Yes!

Was my Writ of Coram Nobis counsel ineffective for not going through and asking for a hearing on the information that trial counsel and P.C.R.A. counsel failed to present? Yes! Strickland v. Washington, 466 U.S. 686 104 S.Ct. 80 L. Ed. 2nd 674-1984. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

Did all counsel in this matter violate appellant's due process? Yes!

Was the lower court in violation of the Constitution of the U.S. 14th Amendment? Yes!

Was the prosecution in violation or should be looked at for prosecutorial misconduct for not revealing the information of the witnesses credibility issues, and if any deal was offered to the victim who opened charges and bench warrant for the arrest? Yes!

Was appointed counsel ineffective for re-filing Appellant's Writ of Coram-Nobis as a P.C.R.A. when appellant filed a Writ of Coram-Nobis? Yes! Strickland v. Washington, 466 U.S. 686 104 S. Ct. 80 L. Ed. 2nd 674, 1984. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

Did appellant file Writ of Coram-Nobis on March 13, 2012? Yes! Benette v. Comm., 556 PA 702 a2d 1125.

Did trial counsel and P.C.R.A. counsel violate due process? Yes! Martinez v. Ryan, 132 S.Ct. 1309.

Appellant's Brief at 7.

Our standard of review for an order denying PCRA relief is whether the record supports the PCRA court's determination, and whether the PCRA

court's determination is free of legal error. ***Commonwealth v. Phillips***, 31 A.3d 317, 319 (Pa. Super. 2011), *appeal denied*, ___ Pa. ___, 42 A.3d 1059 (2012) (citing ***Commonwealth v. Berry***, 877 A.2d 479, 482 (Pa. Super. 2005)). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.*** (citing ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001)).

Initially, we must determine whether this matter is properly before us.

The scope of the PCRA is explicitly defined as follows:

This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief. **The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including *habeas corpus* and *coram nobis*.** This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence, to provide a means for raising issues waived in prior proceedings or to provide relief from collateral consequences of a criminal conviction.

42 Pa.C.S.A. § 9542 (emphasis added).

"The plain language of the statute above demonstrates that the General Assembly intended that claims that **could** be brought under the PCRA **must** be brought under that Act." ***Commonwealth v. Hall***, 771 A.2d 1232, 1235 (Pa. 2001) (emphasis in original). Where a defendant's claims "are cognizable under the PCRA, the common law and statutory remedies now subsumed by the PCRA are not separately available to the defendant."

Id. (citations omitted). By its own language, and by judicial decisions interpreting such language, the PCRA provides the sole means for obtaining state collateral relief. **Commonwealth v. Yarris**, 731 A.2d 581, 586 (Pa. 1999) (citations omitted). Thus, it is well settled that any collateral petition raising issues with respect to remedies offered under the PCRA will be considered a PCRA petition. **Commonwealth v. Deaner**, 779 A.2d 578, 580 (Pa. Super. 2001).

The question then is whether the particular claim at issue, *i.e.*, whether Appellant's guilty plea was induced by counsel's ineffective assistance, is a claim that was available to Appellant under the PCRA. The relevant portion of the PCRA provides as follows:

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

* * *

(2) That the conviction or sentence resulted from one or more of the following:

* * *

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the

petitioner to plead guilty and the
petitioner is innocent.

42 Pa.C.S.A. § 9543(a)(2)(ii-iii). The statute in this matter indicates that claims of ineffective assistance of counsel and claims which challenge the lawfulness of a guilty plea are cognizable under the PCRA. ***Id.***

Because such claims are cognizable under the PCRA, Appellant is precluded from seeking relief pursuant to a “Writ of Error Coram Nobis.” Thus, the PCRA court had no authority to entertain the claim except under the strictures of the PCRA.

We next address whether Appellant satisfied the requirements of the PCRA. A PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition. ***Commonwealth v. Murray***, 753 A.2d 201, 203 (Pa. 2000). A judgment of sentence “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)(3).

Moreover, an untimely petition may be received when the petition alleges, and the petitioner proves, that any of the three limited exceptions to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii),

and (iii), is met.⁴ A petition invoking one of these exceptions must be filed within sixty days of the date the claim could first have been presented. 42 Pa.C.S.A. § 9545(b)(2). In order to be entitled to the exceptions to the PCRA's one-year filing deadline, "the petitioner must plead and prove specific facts that demonstrate his claim was raised within the sixty-day time frame" under section 9545(b)(2). **Carr**, 768 A.2d at 1167.

Even if we were to assume for the sake of argument that Appellant's judgment of sentence became final on or about October 13, 2009, thirty days after the trial court denied Appellant's amended motion for reconsideration of sentence and the time for filing an appeal with this Court expired, we would conclude that the instant PCRA petition, filed on

⁴ The exceptions to the timeliness requirement are:

- (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), (ii), and (iii).

March 13, 2012, is patently untimely.⁵ **See** 42 Pa.C.S.A. § 9545(b)(3); Pa.R.A.P. 903(a).

As previously stated, if a petitioner does not file a timely PCRA petition, his petition may nevertheless be received under any of the three limited exceptions to the timeliness requirements of the PCRA. 42 Pa.C.S.A. § 9545(b)(1). If a petitioner asserts one of these exceptions, he must file his petition within sixty days of the date that the exception could be asserted. 42 Pa.C.S.A. § 9545(b)(2).

The record reflects that Appellant did not specifically raise any of the timeliness exceptions in his instant PCRA petition. Consequently, because the PCRA petition was untimely and no exceptions were pled, the PCRA court lacked jurisdiction to address the claims presented and grant relief. **See Commonwealth v. Fairiror**, 809 A.2d 396, 398 (Pa. Super. 2002) (holding that PCRA court lacks jurisdiction to hear untimely petition). Likewise, we lack jurisdiction to reach the merits of the appeal. **See Commonwealth v. Johnson**, 803 A.2d 1291, 1294 (Pa. Super. 2002) (holding that Superior Court lacks jurisdiction to reach merits of appeal from untimely PCRA petition).

⁵ We observe Appellant needed to file his appeal with this Court on or before Tuesday, October 13, 2009, because October 11, 2009 was a Sunday, and Monday, October 12, 2009, was the Columbus Day holiday. **See** 1 Pa.C.S.A. § 1908 (stating that, for computations of time, whenever the last day of any such period shall fall on Saturday or Sunday, or a legal holiday, such day shall be omitted from the computation).

Moreover, even if we would have held that the instant PCRA petition was timely filed, we would be constrained to conclude that Appellant has not preserved any issues for appeal because Appellant failed to follow the dictates of Pa.R.A.P. 1925(b), which require an appellant to file a statement of errors complained of on appeal when directed to do so by the lower court. Pursuant to this rule, an appellant must comply whenever the trial court orders the filing of a Rule 1925(b) statement in order to preserve a claim for appellate review.⁶ ***Commonwealth v. Lord***, 553 Pa. 415, 719 A.2d 306 (1998). In ***Commonwealth v. Butler***, 812 A.2d 631, 633 (Pa. 2002), our Supreme Court reaffirmed its holding in ***Lord*** and applied it to PCRA petitions as well as direct appeals, stating: “In ***Lord***, however, this Court

⁶ We note that our Supreme Court amended Rule 1925, effective July 25, 2007. The pertinent part of the amended rule is found in subsection (c)(3), which states:

(3) If an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been *per se* ineffective, the appellate court shall remand for the filing of a Statement *nunc pro tunc* and for the preparation and filing of an opinion by the judge.

Pa.R.A.P. 1925(c)(3).

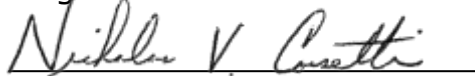
Accordingly, pursuant to the amended version of Rule 1925, counsel’s failure to file a Rule 1925(b) statement on behalf of a criminal appellant is presumptively prejudicial and clear ineffectiveness, and this Court is directed to remand for the filing of a Rule 1925(b) statement *nunc pro tunc* and for the preparation and filing of an opinion by the trial judge. However, the amendment only grants criminal defendants who are represented by counsel the opportunity to have a proper Rule 1925(b) statement filed when counsel neglected to meet the requirements of Rule 1925(b).

eliminated any aspect of discretion and established a bright-line rule for waiver under Rule 1925 Thus, waiver under Rule 1925 is automatic.” **See also Commonwealth v. Oliver**, 946 A.2d 1111, 1115 (Pa. Super. 2008) (noting that **Lord** “requires a finding of waiver whenever an appellant fails to raise an issue in a court-ordered Pa.R.A.P. 1925(b) statement”).

Our review of the certified record reflects that Appellant waived all of his issues on appeal. On August 17, 2012, the PCRA court issued an order directing Appellant to file a Rule 1925(b) statement within twenty-one days. Order, 8/17/12, at 1 (Certified Record No. 40). The docket further reflects that a copy of the order in question was mailed to Appellant on that date. Our review of the certified record reflects that Appellant failed to comply with the PCRA court’s directive and never filed a Rule 1925(b) statement. Thus, had we not concluded that the PCRA petition was untimely filed and we lacked jurisdiction, we would conclude that the issues raised on appeal are waived due to Appellant’s failure to file a Rule 1925(b) statement.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/29/2013