

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

WILLIAM ERNEST LOWERY

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1250 WDA 2013

Appeal from the PCRA Order June 15, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0014836-1994

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

MEMORANDUM BY LAZARUS, J.

FILED: December 16, 2013

William Ernest Lowery appeals from the order entered in the Court of Common Pleas of Allegheny County dismissing his serial petition filed under the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"). We affirm.

We have previously set forth the procedural history of this matter as follows:

On April 10, 1995, following a non-jury trial, Lowery was found guilty of first-degree murder in the shooting death of his paramour. On the same day, he was sentenced to a mandatory term of life imprisonment. Lowery filed a timely appeal, and on August 2, 1996, this Court affirmed his judgment of sentence. ***Commonwealth v. Lowery***, 685 A.2d 210 (Pa. Super. 1996) (unpublished memorandum). Our Supreme Court subsequently denied allowance of appeal on April 7, 1997.

Lowery filed pro se his first PCRA petition on January 29, 1998, which was denied on July 9, 2001. Because Lowery filed his notice of appeal one day late, this Court quashed the appeal on

December 4, 2001 as untimely filed. On May 31, 2002, Lowery filed pro se a document entitled "Habeas Corpus Venue: Extraordinary Writ," which the trial court treated as a second PCRA petition. The trial court dismissed the petition, and on April 16, 2003, this Court affirmed. Our Supreme Court subsequently denied allowance of appeal.

On September 30, 2003, Lowery filed pro se his third PCRA petition, and on February 13, 2004, his appointed counsel filed a petition to reinstate his appeal rights nunc pro tunc to the first PCRA. Although the trial court signed an order on February 17, 2004 purporting to grant that relief, after no appeal was taken, the court dismissed the PCRA petition on July 20, 2004. Lowery appealed, and on October 25, 2005, Attorney Coffey filed with this Court a motion to withdraw as Lowery's counsel and a brief designated as filed pursuant to **Anders v. California**, 386 U.S. 738 (1967)^[1] in which he asserted the . . . appeal was without merit.

Commonwealth v. Lowery, 1462 WDA 2004, at 1-2 (Pa. Super. filed March 20, 2006) (unpublished memorandum). This Court granted counsel's petition to withdraw and affirmed the dismissal of Lowery's third PCRA petition.

Lowery filed the instant PCRA petition, his fourth, on May 6, 2013. In his petition, Lowery asserted that prior counsel abandoned him and that he (Lowery) was incompetent "throughout these entire proceedings." PCRA Petition, 5/6/13, at 5. He asserted that "within the past 17 days from the date of filing this petition, [he] accurately remembered these events, and

¹ In the PCRA context, counsel's proper course of action for seeking withdrawal would have been to file a brief pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (en banc). However, because counsel's self-styled **Anders** brief complied with the requirements of **Turner/Finley**, we treated it as such. **See Lowery**, 1462 WDA 2004, at 2 n.2.

was able to communicate them to this fellow prisoner/next friend.” ***Id.*** at 14.

The PCRA court issued a notice of intention to dismiss pursuant to Pa.R.Crim.P. 907 on May 9, 2013 and dismissed Lowery’s petition as untimely on June 10, 2013. Lowery filed a timely notice of appeal on June 19, 2013, as well as a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal on July 24, 2013. The PCRA court issued its Rule 1925(a) opinion on August 9, 2013.

On appeal, Lowery raises the following issues for our review, verbatim:

1. Did the [trial] court use the wrong standard in rejecting a verdict of voluntary manslaughter when the evidence clearly pointed to a heat of passion[?]
2. Did the [trial] court error by denying [Lowery’s] motion that Judge Walter R. Little had a close relationship with Maybell Mitchell[?]
3. Did the [trial] court error when state failed to give [Lowery] his rights before questioning him?
4. Did the [trial] court error when they failed to give [Lowery] the funds to amount a defense[?] Was [Lowery] afford a public defender in a capital murder trial to make it appear fair[?]
5. Did the [trial] court error when it sentence [Lowery] to a statute of 2501 for the period of your natural life [when] 2501 doesn’t authorize such a sentence[?]

Brief of Appellant, at 6.

We begin by noting that:

This Court’s standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA

court's decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level.

Commonwealth v. Weatherill, 24 A.3d 435, 438 (Pa. Super. 2011).

Here, the issues Lowery raises on appeal, concerning various allegations of error on the part of the trial court during his trial and sentencing, are unrelated to either the claims raised in his most recent PCRA petition or the court's order dismissing that petition. While the PCRA court dismissed Lowery's petition on the basis that it was untimely, none of Lowery's appellate claims or arguments address that issue or Lowery's PCRA claims that one of the exceptions to the time bar applied. Lowery's first appellate issue, that the trial court utilized the wrong standard in rejecting a verdict of voluntary manslaughter, was previously litigated on direct appeal and found to be without merit. The remainder of his appellate claims are either not cognizable under the PCRA, or have been waived for failure to raise them in a prior PCRA proceeding. **See** 42 Pa.C.S.A. §§ 9543-44.

Moreover, a review of Lowery's PCRA petition reveals that the court properly dismissed it as 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. § 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

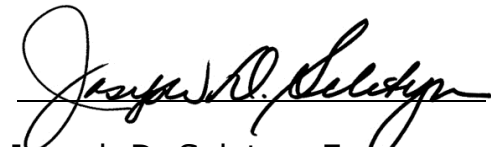
Supreme Court of Pennsylvania, or at the expiration of time for seeking review.” 42 Pa.C.S.A. § 9545(b)(3); **see also** *Commonwealth v. Pollard*, 911 A.2d 1005, 1007 (Pa. Super. 2006). Here, Lowery’s judgment of sentence became final no later than July 7, 1997, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal, when the time for seeking discretionary review in the United States Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3); U.S. Sup. Ct. Rule 13. Thus, Lowery had one year from that date, or until July 7, 1998, to file a timely PCRA petition. **See** 42 Pa.C.S.A. § 9545(b). Lowery did not file the instant petition, his fourth, until May 6, 2013, nearly fifteen years later. Accordingly, the PCRA court had no jurisdiction to entertain Lowery’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).

In his petition, Lowery attempted to circumvent the statutory time bar by invoking the exception under section 9545(b)(1)(ii), which applies when “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[.]” 42 Pa.C.S.A. § 9545(b)(1)(ii). In particular, Lowery claimed that he was abandoned by prior counsel and has been incompetent throughout these proceedings. While allegations of this type may, under certain circumstances, be sufficient to invoke the exception under section 9545(b)(1)(ii), **see** *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa.

2007), and ***Commonwealth v. Cruz***, 852 A.2d 287 (Pa. 2004), Lowery was still required to demonstrate that the facts forming the basis of his claim were previously unknown to him and that he could not have uncovered them with the exercise of due diligence. 42 Pa.C.S.A. § 9545(b)(1)(ii). He must also demonstrate that he filed his petition within 60 days of becoming aware of the relevant facts. 42 Pa.C.S.A. § 9545(b)(2). Based upon the averments contained in his most recent petition, he has failed to satisfy these requirements. A review of the record demonstrates that all “facts” raised by Lowery in his PCRA petition relate to trial counsel’s ineffectiveness and, thus, were known at the time of trial and/or could have been raised in a prior postconviction proceeding. Accordingly, Lowery has failed to properly plead and prove the exception to the time bar under section 9454(b)(1)(ii), and the PCRA court properly dismissed his petition.

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: 12/16/2013

