

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JAMIE M. BROWN,	:	
	:	
Appellant	:	No. 1256 WDA 2012

Appeal from the Order Entered July 26, 2012,
In the Court of Common Pleas of Beaver County,
Criminal Division, at No. CP-04-CR-0000913-2001.

BEFORE: SHOGAN, LAZARUS and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED: August 9, 2013

Appellant, Jamie M. Brown, appeals from the order entered July 26, 2012, denying his post-conviction writ of *habeas corpus*, in which he sought immediate discharge. We treat the writ as a petition for collateral relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A §§ 9541-9546, and affirm, albeit for different reasons. ***Commonwealth v. Gonzalez***, 979 A.2d 879, 890 n.5 (Pa. Super. 2009) (appellate court can affirm the trial court's decision on an alternative basis) (citing ***Commonwealth v. Bostick***, 958 A.2d 543 (Pa. Super. 2008)).

The facts of the underlying crime, summarized by this Court in our memorandum addressing Appellant's direct appeal, are as follows:

The facts at trial established that [Aliquippa Police] Officer [James] Naim was on routine foot patrol in the Linmar Housing

*Retired Senior Judge assigned to the Superior Court.

Plan when [Appellant] approached him from the rear firing a nine millimeter handgun. Two bullets struck the officer in the head causing his immediate death. Testimony established that [Appellant], who was well known to the law enforcement community, told several people that he was going to kill a police officer to "set an example."

Commonwealth v. Brown, 850 A.2d 5, 991 WDA 2002 (Pa. Super. filed February 23, 2004) (unpublished memorandum at 1) ("**Brown I**").

The procedural history is as follows. Appellant's jury trial began on April 29, 2002, and on May 10, 2002, the jury found Appellant guilty of third degree murder. The trial court sentenced Appellant to twenty to forty years of imprisonment on May 29, 2002. This Court affirmed the judgment of sentence on February 23, 2004, **Brown I**, and our Supreme Court denied allowance of appeal on December 3, 2004. **Commonwealth v. Brown**, 863 A.2d 1142 (Pa. 2004).

Appellant filed his first PCRA petition, *pro se*, on June 30, 2005. The PCRA court appointed counsel, who filed an amended petition on March 20, 2006. The PCRA court held an evidentiary hearing on November 1, 2006, following which counsel requested that the record remain open to address additional claims asserting ineffective assistance of counsel in Appellant's direct appeal. Instead, counsel subsequently filed a petition to withdraw representation, which the PCRA court granted on July 6, 2007. Newly appointed counsel filed a "consolidated" PCRA petition incorporating the claims previously heard and asserting new claims of direct appeal counsel's

ineffectiveness. On February 13, 2008, the PCRA court entered an order refusing to reconvene the evidentiary hearing and denying Appellant post-conviction relief on all claims.

We affirmed the order dismissing post-conviction relief on December 31, 2008. **Commonwealth v. Brown**, 965 A.2d 289, 908 WDA 2008 (Pa. Super. filed December 31, 2008) (unpublished memorandum) ("**Brown II**"). The Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. **Commonwealth v. Brown**, 983 A.2d 725 (Pa. 2009).

Appellant thereafter filed a petition for writ of *habeas corpus* in federal court. The magistrate's report and recommendation of January 11, 2012 was adopted by the district court on March 20, 2012. **Brown v. Mazurkiewicz**, 2012 WL 954628 (W.D. Pa. 2012). The United States Court of Appeals for the Third Circuit denied Appellant's certificate of appealability; Appellant's writ of *certiorari* is pending before the United States Supreme Court at docket number 12-9399.

On July 12, 2012, Appellant filed a *pro se* petition for writ of *habeas corpus* in Beaver County Common Pleas Court, which was denied on July 26, 2012. This appeal followed.

Appellant raises the following single issue for our review:

Whether the lower court erred as a matter of law and/or abused its discretion in denying Appellant's petition for writ of

habeas corpus where Appellant was denied his Fourteenth Amendment right to due process of law when he was charged and prosecuted by the Pennsylvania Office Of The Attorney General in the absence of lawful authority, thereby depriving the trial court of jurisdiction to entertain Appellant's trial and rendering Appellant's conviction void *ab initio*?

Appellant's Brief at 4 (full capitalization omitted).

The trial court determined that since Appellant raised the identical issue in his first PCRA petition, and forewent the issue at the evidentiary hearing addressing the petition and on appeal to this Court, the issue was waived. Trial Court Opinion, 11/8/12, at unnumbered 1-2. Thus, the trial court, *sub silentio*, treated the writ as a PCRA petition.

We first must determine whether the relief Appellant sought is suited for *habeas corpus* or whether a remedy exists under the PCRA. If Appellant's claim could have been brought under the PCRA, then *habeas corpus* relief would be unavailable because the "PCRA subsumes the remedy of *habeas corpus* with respect to remedies offered under the PCRA[.]" ***Commonwealth v. Peterkin***, 722 A.2d 638, 640 (Pa. 1998). ***See also*** 42 Pa.C.S.A. § 6503(b) ("Where a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of *habeas corpus* shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law."). Indeed, this Court recently reiterated:

It is well-settled that the PCRA is intended to be the sole means of achieving post-conviction relief. 42 Pa.C.S. § 9542; ***Commonwealth v. Haun***, 613 Pa. 97, 32 A.3d 697 (2011). Unless the PCRA could not provide for a potential remedy, the

PCRA statute subsumes the writ of *habeas corpus*. [***Commonwealth v. Fahy***, [737 A.2d 214,] 223–224 [(Pa. 1999)]; ***Commonwealth v. Chester***, 557 Pa. 358, 733 A.2d 1242 (1999)]. Issues that are cognizable under the PCRA must be raised in a timely PCRA petition and cannot be raised in a *habeas corpus* petition. ***See Commonwealth v. Peterkin***, 554 Pa. 547, 722 A.2d 638 (1998); ***see also Commonwealth v. Deaner***, 779 A.2d 578 (Pa. Super. 2001) (a collateral petition that raises an issue that the PCRA statute could remedy is to be considered a PCRA petition). Phrased differently, a defendant cannot escape the PCRA time-bar by titling his petition or motion as a writ of *habeas corpus*.

Commonwealth v. Taylor, 65 A.3d 462, 465–466 (Pa. Super. 2013) (footnote omitted).

Thus, we must examine the eligibility requirements of the PCRA. It is clear that Appellant has been convicted of a crime under the laws of this Commonwealth and is currently serving a sentence of imprisonment, thereby satisfying 42 Pa.C.S.A. § 9543(a)(1).

We next look to 42 Pa.C.S.A. § 9543(a)(2). The PCRA requires a petitioner to plead and prove that his conviction or sentence resulted from one of the following: a constitutional violation that so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, 42 Pa.C.S.A. § 9543(a)(2)(i); ineffective assistance of counsel, 42 Pa.C.S.A. § 9543(a)(2)(ii); an unlawfully induced plea, 42 Pa.C.S.A. § 9543(a)(2)(iii); the improper obstruction by governmental officials of the petitioner’s right of appeal, 42 Pa.C.S.A. § 9543(a)(2)(iv); the unavailability at the time of trial of exculpatory evidence, 42 Pa.C.S.A.

§ 9543(a)(2)(vi); an illegal sentence, 42 Pa.C.S.A. § 9543(a)(2)(vii); or a proceeding in a tribunal that lacked jurisdiction, 42 Pa.C.S.A. § 9543(a)(2)(viii). Here, Appellant alleged that the trial court was deprived of jurisdiction to try him because the Pennsylvania Office of the Attorney General prosecuted him in the absence of lawful authority. This allegation fits squarely within 42 Pa.C.S.A. § 9543(a)(2)(viii) (“[T]he conviction or sentence resulted from . . . [a] proceeding in a tribunal without jurisdiction.”) Thus, the *habeas corpus* claim must be treated as a PCRA petition.

The filing mandates of the PCRA are jurisdictional in nature and are strictly construed. The question of whether a petition is timely raises a question of law. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review [is] plenary. An untimely petition renders this Court without jurisdiction to afford relief.

Taylor, 65 A.3d at 468 (citations omitted).

We must address whether Appellant satisfied the timeliness requirements of the PCRA. As noted, the timeliness of a PCRA petition is a jurisdictional threshold that may not be disregarded in order to reach the merits of the claims raised in a PCRA petition that is untimely. **Commonwealth v. Robinson**, 837 A.2d 1157, 1161 (Pa. 2003). The PCRA requires a petitioner to file a PCRA petition within one year of the date the judgment of sentence becomes final unless the petitioner pleads and proves that an exception to the one-year time bar is met. 42 Pa.C.S.A. § 9545. 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).

Our review of the record reflects that Appellant’s judgment of sentence became final on March 3, 2005, when the time for filing a petition for *certiorari* with the United States Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3); U.S.Sup.Ct.R. 13. Thus, the instant PCRA petition is patently untimely.

As Appellant did not assert any exceptions to the PCRA time bar, this petition is untimely. Moreover, regarding such failure, we recently held:

We acknowledge that, because the court below did not treat the *habeas corpus* motion as a PCRA petition, it did not give Appellant notice of intent to dismiss or afford Appellant the opportunity to amend the petition. **See** Pa.R.Crim.P. 907(1); Pa.R.Crim.P. 905(B). However, Appellant has not challenged those actions on appeal. The failure to challenge the absence of a Rule 907 notice constitutes waiver. **Commonwealth v. Boyd**, 923 A.2d 513, 514 n.1 (Pa. Super. 2007). Moreover, even if the issue is raised, where the petition is untimely, it does not automatically warrant reversal. **Commonwealth v. Pursell**, 561 Pa. 214, 749 A.2d 911, 917 n.7 (2000).

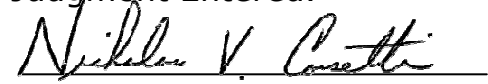
Taylor, 65 A.3d at 468.

Since the court below was without jurisdiction to reach the merits of the petition, we affirm.

Order affirmed.

J-S28010-13

Judgment Entered.

A handwritten signature in black ink, reading "Nicholas V. Conetta", written over a horizontal line.

Deputy Prothonotary

Date: 8/9/2013