

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

WALTER D. LUBAWSKI

Appellant

No. 1282 WDA 2012

Appeal from the PCRA Order July 6, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): Case No. 198707500

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.:

Filed: March 8, 2013

Appellant, Walter D. Lubawski, appeals *pro se* from July 6, 2012 order dismissing his fourth petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The PCRA court summarized the lengthy facts and procedural history of this case as follows.

At CC198707500, [Appellant] was charged with two (2) counts of Robbery¹, and one (1) count each of Receiving Stolen Property², Prohibited Offensive Weapon³, Violation of the Uniform Firearms Act – Firearms Not to be Carried Without a License⁴, Possessing Instrument of Crime⁵, Recklessly Endangering Another Person⁶, and Criminal Conspiracy⁷. At 198709429, [Appellant] was charged with two (2) counts of Criminal Solicitation⁸.

* Retired Senior Judge assigned to the Superior Court.

On March 16, 1988, [Appellant] entered a guilty plea to all charges and was sentenced on April 29, 1988, to two (2) consecutive 10 to 20 year periods of incarceration on the Robbery counts. No further penalty was imposed on the other charges.

Motions to modify the sentence and withdraw the guilty pleas were then filed and denied. [Appellant's] Judgment of Sentence was affirmed by [this Court.] [**See Commonwealth v. Lubawski**, 561 A.2d 820 (Pa. Super. 1989) (unpublished memorandum).]

On March 20, 1990, [Appellant] timely filed his first [PCRA petition]. On March 22, 1990, counsel was appointed and filed an amended petition on [Appellant's] behalf. On May 9, 1990, the [PCRA c]ourt dismissed the PCRA petition. On December 5, 1990, [] the dismissal of [Appellant's] first PCRA was affirmed by [this Court]. [**See Commonwealth v. Lubawski**, 588 A.2d 562 (Pa. Super. 1990) (unpublished memorandum).]

On April 26, 1996, a second PCRA was filed by [Appellant] and on October 30, 1996 was dismissed by the [PCRA c]ourt. On August 27, 1997, [] [this Court] dismissed [Appellant's] appeal for failure to file a brief. [**See** Superior Court Per Curiam Order, 8/27/97.]

On September 12, 2001, [Appellant] filed a writ of *habeas corpus*, and on September 26, 2001, [Appellant] filed a motion for appointment of counsel. On November 3, 2005, a "Motion to Open and Vacate Sentence Pursuant to 42 Pa.C.S.A. § 5505" was filed with a supplemental petition filed on July 25, 2006. [The PCRA c]ourt was assigned and considered [Appellant's] filing under the PCRA since said Act provides the sole means of obtaining collateral relief.

On August 2, 2006, the [PCRA c]ourt issued a Notice of Intention to Dismiss [Appellant's] PCRA

petition pursuant to Pa.R.Crim.P 907. On August 16, 2006, [Appellant's] third PCRA petition was dismissed because the petition was untimely. A *pro se* appeal was then filed and docketed at 1905 WDA 2006. On June 6, 2007, [this Court] affirmed [the PCRA c]ourt's dismissal of [Appellant's] third PCRA. [***See Commonwealth v. Lubanski***,¹] 931 A.2d 48 (Pa. Super. 2007) (unpublished memorandum).]

On December 5, 2011, [the PCRA c]ourt received a letter from [Appellant] that challenged the sentence that he received on June 12, 1987. [The PCRA c]ourt treated the letter, pursuant to 42 Pa.C.S. § 9542, as [Appellant's] fourth PCRA and on January 9, 20[12], issued a Notice of Intention to Dismiss [Appellant's] PCRA petition pursuant to Pa.R.Crim.P 907. [Appellant] requested and received an extension to file a response to [the PCRA c]ourt's notice of its intention to dismiss. [Appellant's] response was due on or before May 30, 2012. Prior to that date, on May 18, 2012, a second extension of time was requested. That motion was denied and [Appellant] was ordered to file a response on or before June 12, 2012.

¹ 18 Pa.C.S. § 3701(a)(1)(i) or (ii)[.]

² 18 Pa.C.S. § 3925[.]

³ 18 Pa.C.S. § 908[.]

⁴ 18 Pa.C.S. § 6106[.]

⁵ 18 Pa.C.S. § 907(a)[.]

⁶ 18 Pa.C.S. § 2705[.]

⁷ 18 Pa.C.S. § 903(a)(1)[.]

¹ The record reflects that Appellant's name was incorrectly spelled "Lubanski" throughout this unpublished memorandum.

⁸ 18 Pa.C.S. § 902(a)[.]

PCRA Court Opinion, 9/24/12, at 1-3 (citations and emphasis omitted; footnotes in original).

On June 5, 2012, Appellant filed a *pro se* response that the PCRA court deemed an amendment to Appellant's fourth petition. In an order dated July 5, 2012, and docketed July 6, 2012, the PCRA court issued notice of its intent to dismiss said petition, pursuant to Rule 907. The record reflects that the PCRA court dismissed Appellant's petition that same day, and entered a second order dismissing said petition on August 1, 2012. Appellant, who is currently incarcerated in SCI Greensburg, filed a timely *pro se* notice of appeal on August 8, 2012.²

On appeal, Appellant raises the following issues for our review.

- I. Appellant contends that he is entitled to an exception to the one-year time limitation of 42 Pa.C.S.A. § 9545(b)(1)(ii), and § 9545(b)(2)[?]
- II. Appellant contends that he was denied due process and equal protection of the law under both the State and Federal Constitutions because the trial court erred in calculating the correct offense gravity score and prior record score[?]
- III. Appellant contends that the trial court erred in failing to file a contemporaneous written

² Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

statement of the reason or reasons for the deviation from the Sentencing Guidelines[?]

Appellant's Brief at 6.

"Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[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 PCRA court level." ***Id.*** "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." ***Commonwealth v. Spatz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). "However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

Before we may address the merits of a PCRA petition, we must first consider the petition's timeliness because it implicates the jurisdiction of both this Court and the PCRA court. ***Commonwealth v. Williams***, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). "Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition." ***Id.*** The PCRA "confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]" ***Commonwealth v. Watts***, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). This is to "accord finality to the collateral review process." ***Id.*** "A petition

for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met." ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009).

Section 9545 provides, in relevant part, as follows.

(b) Time for filing petition.—

(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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

...

42 Pa.C.S.A. § 9545(b).

In the instant matter, Appellant was sentenced on April 29, 1988. Appellant's judgment of sentence became final on May 21, 1989, 30 days after this Court affirmed his judgment of sentence on April 21, 1989, and the period to file a petition for allowance of appeal in our Supreme Court expired. ***See Commonwealth v. Lubawski***, 561 A.2d 820 (Pa. Super. 1989) (unpublished memorandum); ***see also*** 42 Pa.C.S.A. § 9545(b)(3) (stating, "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[]"). Therefore, in order to be timely, Appellant's PCRA petition had to be filed by May 21, 1990. As Appellant's instant amended petition was not filed until June 5, 2012, more than 22 years later, it is patently untimely. Appellant, therefore, must plead and prove one of the three enumerated statutory exceptions to the time-bar.³

³ The 1995 amendments to the PCRA initiated the current one-year time-bar. The 1995 amendments also granted prisoners whose judgment of sentence had become final more than one year before the implementation of the time-bar, one year from the effective date of the amendments to file their first PCRA petition. Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 3(1). Under this provision "a petitioner's first PCRA petition, that would otherwise be considered untimely because it was filed more than one year after the judgment of sentence became final, would be (Footnote Continued Next Page)

Our review of Appellant's 17-page *pro se* appellate brief reveals that he has failed to assert a cognizable time-bar exception. Without a pled and successfully proven exception to the time-bar, we cannot address the merits of the arguments raised. ***Commonwealth v. Perrin***, 947 A.2d 1284, 1285 (Pa. Super. 2008). Moreover, we emphasize that, "[a]lthough this Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit upon the appellant." ***Commonwealth v. Adams***, 882 A.2d 496, 498 (Pa. Super. 2005) (citation omitted). Nor does it entitle him to have this Court advocate on his behalf. ***Commonwealth v. Hakala***, 900 A.2d 404, 407 (Pa. Super. 2006) (stating "[i]t is not this Court's function or duty to become an advocate for the Appellant[]"), *appeal denied*, 900 A.2d 1288 (Pa. 2006). "To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing." ***Adams, supra*** (citations omitted).

Herein, Appellant claims that the newly-discovered evidence exception to the PCRA time-bar, set forth by section 9545(b)(1)(ii), is applicable in the instant matter. Appellant's Brief at 11-12. Specifically, Appellant contends

(Footnote Continued) _____

deemed timely if it was filed by January 16, 1997." ***Commonwealth v. Thomas***, 718 A.2d 326, 329 (Pa. Super. 1998) (*en banc*). However, our Supreme Court has noted this grace period does not apply to second or subsequent PCRA petitions. ***Commonwealth v. Crews***, 863 A.2d 498, 501 (Pa. 2004).

that his receipt on April 4, 2012 of a copy of the April 29, 1988 Sentencing Guideline form constitutes “newly discovered evidence” that he attached to his petition within 60 days of receiving said form. *Id.*

Our Supreme Court has previously described a petitioner’s burden when asserting this exception as follows.

[S]ubsection (b)(1)(ii) has two components, which must be alleged and proved. Namely, the petitioner must establish that: 1) “the *facts* upon which the claim was predicated were *unknown*” and 2) “could not have been ascertained by the exercise of *due diligence*.” 42 Pa.C.S. § 9545(b)(1)(ii) (emphasis added).

Commonwealth v. Bennett, 930 A.2d 1264, 1272 (Pa. 2007). “Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced.” ***Williams, supra*** at 53. Additionally, as this Court has often explained, all of the time-bar exceptions are subject to a separate deadline.

The statutory exceptions to the timeliness requirements of the PCRA are also subject to a separate time limitation and must be filed within sixty (60) days of the time the claim could first have been presented. ***See*** 42 Pa.C.S.A. § 9545(b)(2). The sixty (60) day time limit ... runs from the date the petitioner first learned of the alleged after-discovered facts. A petitioner must explain when he first learned of the facts underlying his PCRA claims and show that he brought his claim within sixty (60) days thereafter.

Id. (some citations omitted).

Instantly, our review of the record reveals that Appellant has failed to satisfy the threshold requirement of section 9545(b)(2) that he raised this exception within 60 days of the date it could have been presented. As noted, Appellant filed the instant petition, an amendment to his fourth petition, on June 5, 2012. Appellant, however, fails to allege with any specificity the reason why he was unable to learn of the April 29, 1988 Sentencing Guideline form prior to said date. Courts of this Commonwealth have long recognized that a petitioner is required to “take reasonable steps to protect his own interests” and “must explain why he could not have obtained the new fact(s) earlier with the exercise of due diligence.” ***Commonwealth v. Monaco***, 996 A.2d 1076, 1080 (Pa. Super. 2010) (citations omitted), *appeal denied*, 20 A.3d 1210 (Pa. 2011); ***see also Bennett, supra***. Here, Appellant offers no explanation, plausible or otherwise, as to why he was incapable of uncovering, with the exercise of due diligence, the April 29, 1988 Sentencing Guideline form in the two decades prior to the expiration of the time-bar deadline. Accordingly, Appellant’s claim must fail.

Appellant’s next argues his sentence is illegal “because it exceeds the lawful statutory limits of the sentencing guidelines.” Appellant’s Brief at 10. Generally, challenges to the legality of an appellant’s sentence cannot be waived. ***See Commonwealth v. Markowitz***, 32 A.3d 706, 711-712 (Pa. Super. 2011), *appeal denied*, 40 A.3d 1235 (Pa. 2012). However, our

Supreme Court has consistently held that in the context of the PCRA, a challenge to the legality of the sentence does not amount to an exception to the time-bar. “Although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA’s time limits or one of the exceptions thereto.” ***Commonwealth v. Fahy***, 737 A.2d 214, 223 (Pa. 1999). Herein, Appellant fails to allege that any of the three exceptions in section 9545(b)(1) apply, and again fails to satisfy the threshold requirement that he raised this claim within 60 days of the date it could have been presented. 42 Pa.C.S.A. § 9545(b)(1), (2). Accordingly, this claim must fail.

Lastly, Appellant argues “the trial court erred in calculating the correct offense gravity score and prior record score[,]” and “in failing to file a contemporaneous written statement of the reason or reasons for the deviation from the sentencing guidelines.” Appellant’s Brief at 13, 15. We note that Appellant could have raised these challenges to the discretionary aspects of his sentence on direct appeal, but failed to do so; thus, they are not cognizable under the PCRA. ***See Commonwealth v. Bond***, 819 A.2d 33, 39 (Pa. 2002) (issues are waived under PCRA if appellant could have presented them on direct appeal but failed to do so); 42 Pa.C.S. § 9544(b) (stating, “an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding[.]”).

Having found that Appellant's amended, fourth PCRA petition was untimely filed and that no cognizable exception to the time-bar applies, we discern no error on the part of the PCRA court in dismissing said petition without a hearing. Therefore, we affirm the July 6, 2012 order of the PCRA court.

Order affirmed.