

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

ROBERT E. MOWERY,

Appellant

No. 1325 WDA 2012

Appeal from the PCRA Order August 8, 2012
in the Court of Common Pleas of Erie County,
Criminal Division at No(s): CP-25-CR-0001122-2006

BEFORE: ALLEN, WECHT, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.:

Filed: March 13, 2013

Robert E. Mowery (Appellant) appeals from the order entered August 8, 2012, dismissing as untimely his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

On October 3, 2006, Appellant pled *nolo contendere* to the offenses of indecent assault, endangering the welfare of children, and corruption of minors. On February 6, 2007, he was sentenced to an aggregate term of 50 months to 12 years' incarceration. He was also determined to be a sexually violent predator (SVP) pursuant to 42 Pa.C.S. §§ 9791-9799.41. Appellant filed a timely post-sentence motion, which was denied on February 28, 2007. Appellant did not file a direct appeal; therefore, his judgment of sentence became final on March 31, 2007, the day after his right to file a direct appeal expired. On June 8, 2009, Appellant filed a *pro se* PCRA

*Retired Senior Judge Assigned to the Superior Court.

petition. Counsel was appointed and, on July 16, 2009, counsel filed a petition to withdraw asserting the petition was frivolous pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On July 31, 2009, the PCRA court, pursuant to Pa.R.Crim.P. 907, sent Appellant a notice of its intent to dismiss his petition as untimely. Appellant did not respond, and on August 24, 2009, the PCRA court entered an order permitting counsel to withdraw and dismissing Appellant's petition.

On August 7, 2012, Appellant filed the instant *pro se* petition asserting that trial counsel was ineffective, asking for the reinstatement of his direct appeal rights, and asking for counsel to be appointed. On August 8, 2012, the PCRA court entered an order denying the petition, concluding that it was an untimely second PCRA petition.¹ Appellant *pro se* filed a timely notice of appeal. The PCRA court did not order Appellant to file a concise statement pursuant to Pa.R.A.P. 1925 and none was filed.

¹ We point out that the PCRA court improperly denied Appellant's PCRA petition without first providing a notice of intent to dismiss pursuant to Pa.R.Crim.P. 907(1). The rule provides that a PCRA court shall give notice of its intent to dismiss the PCRA petition, and allow the petitioner 20 days to respond. "It is, of course, clear that the notice requirement of the intention to dismiss, is mandatory '(the judge *shall* (give notice and) *shall* state (the reasons)' (emphasis added)." ***Commonwealth v. Feighery***, 661 A.2d 437, 439 (Pa. Super. 1995) (citing Pa.R.Crim.P. 907(1)). However, Appellant has not raised or briefed this issue on appeal; therefore, it is waived. ***See J.J. DeLuca Co., Inc. v. Toll Naval Associates***, 56 A.3d 402 (Pa. Super. 2012), reargument denied (Dec. 20, 2012).

On appeal, Appellant sets forth the same issues he raised in his petition presented to the PCRA court, as well as asserting that the PCRA court erred in dismissing his petition. Appellant's Brief at 4.² For the following reasons, we conclude that Appellant is not entitled to relief.

The timeliness of a post-conviction petition is jurisdictional. ***Commonwealth v. Robinson***, 12 A.3d 477, 479 (Pa. Super. 2011). Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence is final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition is met. 42 Pa.C.S. § 9545. The exceptions to the timeliness requirement are:

- (i) the failure to raise the claim previously was the result of interference of 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 The Commonwealth filed a letter with this Court declining to file a responsive brief. Letter to Superior Court Prothonotary, 11/7/2010.

42 Pa.C.S. § 9545(b)(1)(i), (ii), and (iii). A PCRA petition invoking one of these statutory exceptions must “be filed within 60 days of the date the claims could have been presented.” **Robinson**, 12 A.3d at 480.

Appellant’s PCRA petition was filed on August 7, 2012, over five years after his judgment of sentence became final in March 2007. Therefore, Appellant had the burden of pleading and proving a timeliness exception. The PCRA court determined that Appellant failed to do so. PCRA Court Order, 8/8/2012. We agree.

Our review of the record establishes that Appellant does not make any attempt to argue a timeliness exception; rather, he contends that he did not have meaningful review of his first PCRA petition because counsel filed a **Turner/Finley** letter. Such contention is without merit, as counsel was appointed and counsel complied with the mandates of **Tuner/Finley** in connection with the petition. Furthermore, the PCRA court dismissed that petition on July 31, 2009. Any issue regarding meaningful review of that petition should have been raised by appealing that order or in a new PCRA petition filed within 60 days of the PCRA court’s dismissal of that petition. Here, Appellant does not offer any reason for the nearly three year delay in responding to that order.

Finally, Appellant was not entitled to counsel for this second PCRA petition. “[W]hen an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall

appoint counsel to represent the defendant on the defendant's **first** petition for post-conviction collateral relief." Pa.R.Crim.P. 904(C) (emphasis added). As this petition was Appellant's second petition, he was not entitled to counsel.

Thus, the PCRA court's determination that it lacked jurisdiction to consider the merits of Appellant's petition is supported by the record and reflects an accurate application of the law. As such, we affirm the order dismissing Appellant's PCRA petition.

Order affirmed.