

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

JAMIE RAY JOHNSON

Appellant

No. 1348 MDA 2012

Appeal from the PCRA Order July 2, 2012
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0001480-2007,
CP-41-CR-0001558-2007, and CP-41-CR-0002125-2007

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.

Filed: March 4, 2013

Appellant, Jamie Ray Johnson, appeals *pro se* from the July 2, 2012 order dismissing his petition filed pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After review, we affirm.

The PCRA court summarized the underlying facts as follows.

On February 14, 2008, [Appellant] pled guilt[y] to [s]imple [a]ssault at Docket Number 2125-227. On February 27, 2008, [Appellant] pled guilty, pursuant to Docket Number 1480-2007, to charges that include[d] [t]heft by [u]nlawful [t]aking, [t]heft from a [m]otor [v]ehicle, [r]eceiving [s]tolen [p]roperty, [t]heft by [u]nlawful [t]aking, and [l]oitering and [p]rowling. On the same day, [Appellant] also pled guilty, pursuant to Docket Number 1558-2007, to [f]alse [r]eports. On April 18, 2008, [Appellant] received an aggregate sentence of thirty-nine (39) months to seventy-eight (78) months [of] incarceration.

* Retired Senior Judge assigned to the Superior Court.

PCRA Court Opinion, 8/16/2012, at 1.

Appellant did not file a post-sentence motion or direct appeal. The record reveals Appellant sent a Petition for Writ of Habeas Corpus to the Lycoming County Clerk of Courts dated April 6, 2011.¹ Appellant asserted that the Department of Corrections miscalculated his minimum and maximum sentence dates and did not give him all credit for time served. On May 20, 2011, Judge Nancy Butts sent a letter to the Department of Corrections, with a copy to Appellant, stating that “it does not appear to the Court that [Appellant’s] sentence was contrary to any plea agreement” and suggested that Appellant file a PCRA petition. Letter from The Honorable Nancy Butts to Ms. Weisenstein, 5/20/2011.

Appellant filed the instant PCRA petition, asserting essentially the same claims, on February 22, 2012. Counsel was appointed and on April 20, 2012, court-appointed counsel filed a motion to withdraw and no-merit letter 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 May 25, 2012, the PCRA court, pursuant to Pa.R.Crim.P. 907, sent Appellant a notice of intent to dismiss his petition and permitted counsel to withdraw.

¹ For reasons not clear from the record, that Petition was not docketed until February 13, 2012.

Appellant did not respond,² and on July 2, 2012, the PCRA court entered an order dismissing Appellant's petition. Appellant *pro se* filed a timely notice of appeal, and Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

The PCRA court determined that Appellant's petition was untimely and dismissed the petition. PCRA Court Opinion, 8/16/2012, at 2.³ We agree, albeit on a slightly different basis than that advanced by the PCRA court.⁴

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:

² In a response dated July 19, 2012 yet somehow docketed on July 11, 2012, Appellant asserted that the PCRA court should accept a late response to the Rule 907 notice. The PCRA court did not rule on this response; however, any response is moot based on our disposition, *infra*.

³ The Commonwealth has not filed a brief, but on October 22, 2012, sent a letter to this Court indicating its reliance on the opinion filed by the PCRA court.

⁴ "[A]n appellate court may uphold an order of a lower court for any valid reason appearing from the record." ***Ario v. Ingram Micro, Inc.***, 965 A.2d 1194, 1200 (Pa. 2009).

(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.

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.

First, we point out that Appellant’s petition for writ of *habeas corpus* dated April 6, 2011 should have been treated by the court as a PCRA petition. It is well-settled that

both the PCRA and the state *habeas corpus* statute contemplate that the PCRA subsumes the writ of *habeas corpus* in circumstances where the PCRA provides a remedy for the claim. **Commonwealth v. Peterkin**, 554 Pa. 547, 722 A.2d 638 at 640. **See also** 42 Pa.C.S. § 9542 (“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*.”); 42 Pa.C.S. § 6503(b) (“[T]he writ of *habeas corpus* shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law.”).

Commonwealth v. Stout, 978 A.2d 984, 986 (Pa. Super. 2009) (citing **Commonwealth v. Hackett**, 956 A.2d 978, 985-86 (Pa. 2008)). In his

petition for writ of *habeas corpus*, Appellant raises claims regarding the calculation of his sentence and credit for time served. “An appellant's challenge to the trial court's failure to award credit for time spent in custody prior to sentencing involves the legality of sentence” and is cognizable under the PCRA. ***Commonwealth v. Beck***, 848 A.2d 987, 989 (Pa. Super. 2004). Furthermore, as it was Appellant's first PCRA petition, counsel should have been appointed, before determining whether or not the petition was untimely. **See** Pa.R.Crim.P. 904 (“[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.”).

Even considering Appellant's *habeas corpus* petition a PCRA petition, it was still filed untimely. Appellant was sentenced on April 18, 2008. Because he did not file a post-sentence motion or direct appeal, his judgment of sentence became final on the thirty-first day after sentencing - May 20, 2008. Thus, Appellant had one year from that date, until May 20, 2009, to file a timely PCRA petition. He did not do so. Accordingly, either the petition for writ of *habeas corpus* or the subsequent PCRA petition had to include averments as to how it met the exceptions to the timeliness requirements. Neither petition contains such averments; therefore, the PCRA court did not err in dismissing the PCRA petition as untimely.

To the extent that Appellant contends his sentence is illegal, we still do not have jurisdiction to consider it. “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, 224 (Pa. 1999). Because Appellant did not plead or prove an exception, neither the PCRA court nor this Court has jurisdiction to consider it. As such, we affirm the order dismissing Appellant’s PCRA petition.

Order affirmed.