

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DONALD HAKIM PENNIX

Appellant

No. 1723 MDA 2012

Appeal from the PCRA Order August 30, 2012
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-0001838-2008
CP-40-CR-0001839-2008

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.:

FILED JUNE 04, 2013

Appellant, Donald Hakim Pennix, appeals *pro se* from the August 30, 2012 order dismissing his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The relevant facts and procedural history, as gleaned from the certified record, follow. On January 7, 2010, Appellant was convicted of criminal conspiracy, delivery of a controlled substance, and possession with intent to deliver a controlled substance (PWID).¹ Subsequently, on February 17,

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 903(a)(1) and two counts of 35 P.S. § 780-113(a)(30), respectively.

2010, Appellant was sentenced to an aggregate term of seven to 14 years' imprisonment. Thereafter, on January 10, 2011, this Court affirmed Appellant's judgment of sentence. **Commonwealth v. Pennix**, 23 A.3d 1078 (Pa. Super. 2011) (unpublished memorandum). Appellant did not file a petition for allowance of appeal with our Supreme Court.

On September 16, 2011, Appellant filed a *pro se* motion requesting disclosure of various documents in the Commonwealth's possession to aid in the preparation of his first PCRA petition. Thereafter, on October 14, 2011, the trial court appointed Jeffrey Yelen, Esquire (Attorney Yelen) to represent Appellant in his PCRA proceedings. Subsequently, on November 15, 2011, Appellant filed a motion to proceed *pro se*.

A hearing on the motion was held on February 17, 2012, and a colloquy was conducted pursuant to **Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998), and **Commonwealth v. Robinson**, 970 A.2d 455, 457 (Pa. Super. 2009) (*en banc*). N.T., 2/17/12, at 2-5. In addition, Appellant signed a written waiver of representation. **Id.** at 5. At the hearing, the trial court granted Appellant's request to proceed *pro se* on the record and excused Attorney Yelen from further representation of Appellant.² **Id.** Appellant filed the instant *pro se* PCRA petition that same day. **Id.** at 11.

² On February 22, 2012, the trial court's grant of *pro se* status was reduced to writing in an order granting Appellant's request to proceed *pro se* and allowing Attorney Yelen to withdraw.

Subsequently, on July 11, 2012, the PCRA court held a hearing on Appellant's petition. Thereafter, on August 30, 2012, the PCRA court entered an order denying Appellant's petition on the merits. This timely appeal followed on September 7, 2012.³

Before we can address the merits of Appellant's claims, we must first consider the timeliness of his PCRA petition because it implicates the jurisdiction of both this Court and the PCRA court. ***Commonwealth v. Albrecht***, 994 A.2d 1091, 1093 (Pa. 2010). "The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims." ***Id.*** (quotation marks and citation omitted). "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). Additionally, the initial

³ The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The PCRA court filed its 1925(a) opinion on October 10, 2012. Appellant remains *pro se* on appeal. The record reflects that standby counsel was appointed at Appellant's request on September 10, 2012.

request for documentation to aid in preparation of a PCRA is not itself a PCRA petition and cannot substitute for the timely filing of a PCRA petition. **See Commonwealth v. Crider**, 735 A.2d 730, 733 (Pa. Super. 1999) (distinguishing an appellant's request for documents from the filing of a PCRA petition and determining that the appellant's PCRA petition was untimely filed).

In the instant matter, Appellant's judgment of sentence became final on February 9, 2011 after the thirty-day time period for filing a petition for allowance of appeal with our Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(3); Pa.R.A.P. 1113(a). Therefore, in order for Appellant's petition to be timely, it had to be filed by February 9, 2012. As noted, Appellant did not file the instant petition until February 17, 2012. Thus, it is patently untimely.

Nevertheless, a petition will not be deemed untimely under the PCRA if it fits within any of the exceptions provided in section 9545(b)(1)(i-iii). **Commonwealth v. Hutchins**, 760 A.2d 50, 54-55 (Pa. Super. 2000). After careful review, we conclude that Appellant has neither alleged nor proven an exception to the PCRA time-bar. Specifically Appellant's petition does not aver that the delay in raising his current claims was caused by the interference of government officials pursuant to § 9545(b)(1)(i), or that the claims that comprise his current PCRA petition were not known to him or could not have been ascertained by the exercise of due diligence pursuant to

§ 9545(b)(1)(ii), or that his claims consist of recently recognized constitutional rights pursuant to § 9545(b)(1)(iii). Accordingly, we are constrained to affirm the dismissal of Appellant's untimely PCRA petition.

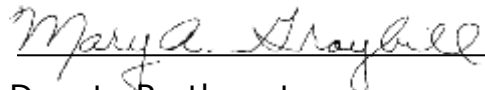
Although we cannot reach the merits of Appellant's claim because the instant petition was untimely, we note that Appellant was appointed PCRA counsel in October 2011, before the expiration of the one-year limitations period. Further, counsel was not permitted to withdraw until after the expiration of the limitations period, yet counsel failed to file a PCRA petition on behalf of Appellant within that time. Moreover, had Appellant attempted to file his *pro se* PCRA petition prior to counsel's withdrawal, said petition would have been a legal nullity. **See *Commonwealth v. Nischan***, 928 A.2d 349, 355 (Pa. Super. 2007) (noting that a defendant's *pro se* filings while represented by counsel are legal nullities), *appeal denied*, 936 A.2d 40 (Pa. 2007). Accordingly, since Appellant was not permitted to represent himself prior to expiration of the limitations period, and because PCRA counsel failed to file a petition on his behalf, Appellant has lost his only opportunity to obtain relief on the claims presented herein. Nonetheless, as our precedent makes clear, this Court may not fashion equitable exceptions to the PCRA time-bar, even in compelling circumstances such as this.

Commonwealth v. Watts, 23 A.3d 980, 983 (Pa. 2011). Based on the foregoing, we affirm the dismissal of Appellant's PCRA petition.⁴

Order affirmed.

Judge Shogan and Judge Colville concur in the result.

Judgment Entered.


Deputy Prothonotary

Date: 6/4/2013

⁴ To the extent our rationale differs from that of the trial court, we note that this Court is not bound by the rationale of the trial court and may affirm on any basis evident from the record. **Commonwealth v. Doty**, 48 A.3d 451, 456 (Pa. Super. 2012).

Moreover, were this Court able to reach the merits of Appellant's claims, we would conclude Appellant would not be entitled to relief. Specifically, Appellant presents four layered claims of ineffective assistance. Appellant's Brief at 6-7. Our Supreme Court has previously held that, "in cases where appellate counsel is alleged to be ineffective for failing to raise a claim of trial counsel's ineffectiveness ... the inability of the petitioner to prove each prong of the **Pierce** test in respect to trial counsel's purported ineffectiveness alone will be fatal to his layered ineffectiveness claim." **Commonwealth v. Mallory**, 941 A.2d 686, 699 n.15 (Pa. 2008) (citation omitted).

Our review of the record reveals that Appellant has failed to meet the prejudice prong of the **Pierce** test with respect to each of his first three claims of trial counsel's ineffectiveness. With regard to his fourth claim of ineffective assistance, we conclude Appellant's Double Jeopardy argument lacks merit. Since Appellant's underlying claim is without merit, his ineffectiveness claims on this ground must fail. **See Commonwealth v. Sepulveda**, 55 A.3d 1108, 1118 (Pa. 2012) (stating, "[c]ounsel cannot be deemed ineffective for failing to raise a meritless claim[]"). Accordingly, Appellant would not be entitled to relief.