

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
GREGORY SCOTT VASILISIN,	:	No. 1858 WDA 2010
	:	
Appellant	:	

Appeal from the PCRA Order, October 25, 2010,  
in the Court of Common Pleas of Warren County  
Criminal Division at No. CP-62-CR-0000304-2003

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND DONOHUE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.:

Filed: March 19, 2013

Appellant challenges the order dismissing his first petition brought pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 *et seq.* Finding that this petition is untimely, we will affirm.

On March 10, 2004, appellant pleaded guilty to first degree murder in relation to the killing of his wife in November 2002. Appellant pleaded guilty to avoid the death penalty. The district attorney threatened to seek the death penalty on the aggravating factor of torture, based upon the fact that appellant slit both of his wife's eyes during the murder. Immediately following the plea, the negotiated sentence of life imprisonment was imposed plus restitution in the amount of \$5,497.60. No direct appeal was filed.

On March 8, 2005, the Commonwealth filed a motion to transfer title of two vehicles owned by appellant in order to pay his restitution. A hearing was held on August 15, 2005, and on September 15, 2005, an order was entered directing that the vehicles be sold at public auction. The vehicles were sold in May of 2006 for \$2,375. On June 7, 2006, appellant filed a motion to suspend the sale. This motion was denied by order entered June 13, 2006. Appellant filed an appeal. This court affirmed the order on September 11, 2007, and our supreme court denied appeal on June 26, 2008. ***Commonwealth v. Vasilisin***, 938 A.2d 1122 (Pa.Super. 2007) (unpublished memorandum), ***appeal denied***, 597 Pa. 716, 951 A.2d 1164 (2008).

On July 7, 2008, appellant filed his first petition pursuant to the PCRA ***pro se***. Therein, appellant asserted that the sale of his vehicles constituted an illegal modification of sentence. Appellant also cited to ***Commonwealth v. Lark***, 560 Pa. 487, 746 A.2d 585 (2000), apparently believing that the time to file his PCRA petition was tolled while he litigated the appeal of the order directing the sale of his vehicles. Finally, appellant also invoked a time of filing exception under the PCRA pertaining to after-discovered facts. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(ii).

Counsel was appointed, but ultimately filed a motion to withdraw and a "no-merit" brief pursuant to ***Turner-Finley*** practice on September 5, 2008. ***See Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988);

***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*). Counsel analyzed appellant's petition and concluded it was untimely. On September 24, 2008, appellant filed a ***pro se*** objection to the no-merit letter. Therein, he raised a vague claim that his plea was involuntary as having been induced by lies concerning the victim's wounds.

On November 20, 2008, an order was entered permitting counsel to withdraw. Appellant appealed this order. On January 27, 2009, this court quashed the appeal as having been taken from an interlocutory order. Appellant then pursued a petition for allowance of appeal/petition for review before the supreme court. On June 8, 2009, the petition for review was denied.

On August 4, 2010, a hearing was conducted on appellant's PCRA petition. During the hearing, appellant raised a claim of ineffective assistance on the part of PCRA counsel. (Notes of testimony, 8/4/10 at 4-6.) By order entered October 25, 2010, the PCRA court denied appellant's petition. This timely appeal followed.<sup>1</sup>

Appellant raises the following issues on appeal:

- A. Did the court err in requiring Vasilisin to proceed ***pro se*** at his PCRA hearing after his appointed counsel was permitted to withdraw without complying with the ***Finley/Turner*** requirements?

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<sup>1</sup> We note that appellant has filed a counseled brief. The record does not reveal whether counsel was appointed or privately retained.

- B. Did the PCRA court err in denying Vasilisin's petition as untimely when Vasilisin was not given sufficient opportunity to provide the court with information to support his claim that his filing was timely under an exception to the one-year rule?
- C. Did the PCRA court err in denying Vasilisin's petition after Vasilisin presented evidence that his trial counsel was ineffective?
- D. Did the PCRA court err in denying Vasilisin's petition after Vasilisin demonstrated that his guilty plea was not knowing and intelligent?

Appellant's brief at 4.

Our standard of review for an order denying post-conviction relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Franklin***, 990 A.2d 795, 797 (Pa.Super. 2010). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

Moreover, as one of appellant's issues on appeal is stated in terms of ineffective assistance of counsel, we also note that appellant is required to make the following showing in order to succeed with such a claim: (1) that the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa.Super. 2010). The failure to satisfy any

prong of this test will cause the entire claim to fail. ***Commonwealth v. Daniels***, 947 A.2d 795, 798 (Pa.Super. 2008). Finally, counsel is presumed to be effective, and appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa.Super. 2003).

A PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition. ***Commonwealth v. Taylor***, 933 A.2d 1035, 1038 (Pa.Super. 2007), ***appeal denied***, 597 Pa. 715, 951 A.2d 1163 (2008).

Appellant's judgment of sentence became final on April 9, 2004, 30 days after the judgment of sentence was entered and the time for filing a direct appeal expired. 42 Pa.C.S.A. § 9545(b)(3); Pa.R.A.P., Rule 903(a), 42 Pa.C.S.A. The instant petition, filed July 7, 2008, is manifestly untimely, and cannot be reviewed unless appellant invokes a valid exception to the time bar of the PCRA. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(i-iii).

Preliminarily, we note that the time for filing appellant's petition was not tolled, pursuant to ***Lark***, while he litigated the appeal of the sale of his vehicles. The sale of the vehicles was not, as appellant characterizes it, an illegal modification of his sentence. Appellant's life sentence and restitution of \$5,479.60 were never altered. Consequently this matter was entirely

collateral to appellant's conviction and judgment of sentence and never served to bar the bringing of a timely PCRA petition.

We will now discuss appellant's first two issues together. Appellant argues that appointed PCRA counsel was ineffective in failing to consult with him whatsoever. Appellant claims that had counsel consulted with him, counsel would have learned that appellant had a valid time of filing exception under the after discovered fact exception:

**(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:
  - (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;

42 Pa.C.S.A. § 9545(b)(1)(ii).

Specifically, appellant claims his wife's autopsy report as an after-discovered fact. Appellant claims that the report showed no injury to his wife's eyes. Thus, when the district attorney threatened appellant with the death penalty based upon torture, the threat was based upon lies about what the autopsy report stated and resulted in a coerced, involuntary plea. We see two fatal flaws in appellant's argument.

First, we find that appellant cannot meet the due diligence requirement. The autopsy report was undoubtedly available at the time of trial. Appellant would have known at the time whether or not he slit his wife's eyes. Certainly, if he did not injure his wife's eyes he should have communicated this to trial counsel who could then have requested the autopsy report. That appellant failed until now to raise this claim evinces a complete lack of due diligence on his part.<sup>2</sup>

Second, appellant states in his brief that he obtained the autopsy report in September 2006. (Appellant's brief at 13.) A petition invoking a time of filing exception must be filed within 60 days of the time it could have first been raised. 42 Pa.C.S.A. § 9545(b)(2). If we give appellant the benefit of the doubt and find that he obtained the autopsy report on September 30, 2006, he would have had to file a petition relying upon it for an exception by November 29, 2006. Thus, the instant PCRA petition, filed July 7, 2008, is untimely to raise this exception on this basis. Finally, we also reiterate that the time appellant spent litigating the sale of his vehicles did not toll the time for him to challenge his conviction and judgment of sentence through the PCRA, nor the time to file a petition raising this exception on this basis.

Since appellant's PCRA petition was untimely filed and no valid time of filing exception exists, we have no jurisdiction to reach appellant's final two

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<sup>2</sup> We also question why appellant would succumb to the Commonwealth's threats to use this as an aggravating factor if he knew he had not injured his wife's eyes.

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issues, pertaining to trial counsel's alleged ineffectiveness and the validity of appellant's guilty plea.

Accordingly, having found that appellant's PCRA petition was untimely filed, and that no valid time of filing exception exists, we will affirm the order below.

Order affirmed.