NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MATHEW J. WILSON,	:	No. 1859 WDA 2012
Appellant	:	

Appeal from the PCRA Order, August 17, 2012,
in the Court of Common Pleas of Venango County
Criminal Division at Nos. CP-61-CR-0000030-2010,
CP-61-CR-0000353-2009, CP-61-CR-0000966-2002

BEFORE: FORD ELLIOTT, P.J.E., OTT AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 18, 2013**

Appellant, Mathew J. Wilson, appeals from the August 17, 2012 order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The procedural history of this case follows. On October 17, 2002, appellant was charged at CR No. 966-2002 with two counts of driving under the influence of alcohol ("DUI") in violation of 75 Pa.C.S.A. § 3731(a) (10) and § 3731(a)(4), both graded as misdemeanors of the second degree. After several continuances, appellant was granted admission into the Accelerated Rehabilitative Disposition ("ARD") program on June 3, 2004, which was to last 24 months. Among the conditions imposed was the requirement that appellant pay court costs and supervision fees and

complete DUI school. Additionally, appellant was informed that the program runs up to two years and that a violation of the conditions of ARD would result in appellant being tried as though he had never been in the program.

Subsequently, appellant was granted seven extensions to enable him to complete the ARD program. For each extension, the reasons provided by appellant were that his medical problems prevented completion of the payment plan or DUI school. On one occasion in particular, appellant noted he had been unable to complete DUI school as his wife gave birth the day class was scheduled.

On February 1, 2009, appellant was charged at CR No. 353-2009 with two counts of DUI in violation of Section 3802(a)(1) and (b), both ungraded misdemeanors, and one count of driving while operating privileges are suspended or revoked in violation of Section 1543(a), a summary offense. As these charges were a violation of ARD, a petition to revoke was filed by the Commonwealth on March 5, 2009. Thereafter, on April 9, 2009, the court granted ARD revocation.

On September 10, 2009, following several continuances due to appellant's medical problems, appellant pled guilty at CR No. 966-2002 to count 2, a DUI in violation of section 3731(a)(4), a second-degree misdemeanor, and at CR No. 353-2009, to count 2, a DUI in violation of section 3802(b), an ungraded misdemeanor, and count 3, driving while operating privileges are suspended or revoked, a summary offense. He was

sentenced on October 27, 2009, at CR No. 966-2002 to 30 days to 6 months and the sentence at CR No. 353-2009 was to run consecutively for an aggregate sentence of 32 days to 24 months less one day.

On November 18, 2009, appellant was charged in a third case at CR No. 30-2010 and subsequently pled guilty to theft by deception. He was sentenced on April 8, 2010 to 12 months' probation consecutive to the DUI sentences imposed on October 27, 2009. Approximately two months later, appellant was detained for probation and parole violations in all three cases. Due to his medical problems, appellant was released pending the revocation hearing. On July 29, 2010, appellant admitted to the violations, and probation and parole were revoked in all three cases. On October 7, 2010, at CR No. 30-2010, appellant was sentenced to serve 6 to 12 months in a state correctional facility; this sentence was to run consecutive to prior sentences imposed at CR Nos. 966-2002 and 353-2009.

On May 31, 2011, appellant was paroled on all three cases. Subsequently, he was convicted of corruption of minors at CR No. 221-2012. He pled guilty to the charge, and on July 19, 2012, he was sentenced to 5 years' probation consecutive to the sentence imposed at CR No. 353-2009.

Appellant filed a ***pro se*** PCRA petition on May 24, 2012 at CR Nos. 966-2002, 353-2009, and 30-2010. Pamela R. Logsdon Sibley,

Esq., was appointed and filed a ***Turner***/***Finley***[1] letter and a motion to withdraw. (Docket #12.) PCRA counsel averred that the petition was untimely filed. Counsel also reviewed the exceptions to the timeliness requirement and concluded none were met. On August 17, 2012, the court, after conducting an independent review of the record, determined that appellant's petition was untimely, and even if timely, the claims advanced lacked merit; counsel was permitted to withdraw. (Docket #10, 11.)

On September 12, 2012, appellant, through new counsel, filed a notice of appeal. (Docket #5.) Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion. Herein, the following issues have been presented for our review:

> 1. Rule 316(B) of the Pennsylvania Rules of Criminal Procedure provides that the period of the [ARD] program shall not exceed two years. The Sentencing Court committed numerous errors of law by granting each Motion to Extend the period for Appellant's ARD where said extensions violated said Rule.
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> 2. As the Sentencing Court granted numerous extensions to Appellant's ARD program, extending it more than five years from the date of sentencing in violation of Rule 316(B), the sentence imposed on October 27, 2009 in case number 966 CR 2002 and 353 CR 2009 were improper as they were predicated on said wrongful ARD extensions.

[1] ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (***en banc***).

> 3. 42 Pa.C.S.A. § 9545(b)(1)(ii) provides that a defendant may file a PCRA Petition more than one year following the date that an Order has become final in the event that the defendant can offer proof of the existence of evidence not known to him previously. Appellant was unaware of the Rule which limits the time period of an ARD to two (2) years until May, 2012, shortly prior to filing his PCRA.

Appellant's brief at 10.

Our standard and scope of review in PCRA cases is well settled:

> This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA court's decision, 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 trial level.

Commonwealth v. Brandon, 51 A.3d 231, 233 (Pa.Super. 2012) (citation and quotation marks omitted).

An untimely petition renders this court without jurisdiction to afford relief. ***Commonwealth v. Gandy***, 38 A.3d 899, 903 (Pa.Super. 2012), ***appeal denied***, 616 Pa. 651, 49 A.3d 442 (2012). Pursuant to the 1995 amendments to the Post Conviction Relief Act, any PCRA petition must be filed within one year from the date a judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). "A judgment of sentence becomes final once an appellant's means of direct review of a conviction, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, have concluded or the time limits for seeking a direct appeal

have expired." ***Commonwealth v. Tedford***, ___ Pa, ___, ___, 781 A.2d 1167, 1170-1171 (2001).

The PCRA court was correct in assessing that appellant's petition was untimely filed; appellant did not file his petition within one year of the judgments becoming final in any of the three challenged cases. The latest filing date would relate to the October 7, 2010 judgment of sentence at CR No. 30-2010. Appellant's judgment of sentence in this case became final 30 days after October 7, 2010, or November 8, 2010,[2] when the time for taking a direct appeal expired. ***See*** 42 Pa.C.S.A. § 9545(b)(3); Pa.R.Crim.P. 720(A)(3). Hence, appellant had until November 8, 2011, to file a timely PCRA petition.[3] The instant PCRA petition was filed on May 24, 2012, and is patently untimely. This court has long recognized that "although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's limits or one of the exceptions thereto." ***Commonwealth v. Fowler***, 930 A.2d 586, 592 (Pa.Super. 2007) (citation omitted), ***appeal denied***, 596 Pa. 715, 944 A.2d 756 (2008).

Notwithstanding the untimely nature of the petition, the PCRA provides for three exceptions to the one-year time bar. 42 Pa.C.S.A.

[2] Because November 6, 2010, fell on a Saturday, appellant's judgment of sentence became final on Monday. 1 Pa.C.S.A. § 1908.

[3] The PCRA court erroneously stated that appellant had until October 7, 2011, to file a timely PCRA petition; this calculation does not take into account the 30-day appeal period.

§ 9545(b)(1)(1)(i)-(iii). Appellant attempts to invoke the "after-discovered facts" exception to the time-bar. 42 Pa.C.S.A. § 9545(b)(1)(ii). On appeal, he maintains that in May of 2012 he learned of Pa.R.Crim.P. Rule 316(B), which is derivatively applicable and implicates the legality of his ARD sentence. Rule 316(B) states that the period of an ARD program shall not exceed two years; appellant avers that his sentence at CR No. 966-2002 is illegal because his ARD was revoked after what he now alleges to be the maximum term of two years had expired. He claims he only discovered this purported illegality in May of 2012.

We cannot find that appellant's discovery of a rule of criminal procedure is a "fact" as contemplated by Section 9545(b)(1)(ii). An analogous assertion was made in ***Commonwealth v. Watts***, 611 Pa. 80, ___, 23 A.3d 980, 987 (2011). Therein, our supreme court has held that "subsequent decisional law does not amount to a new 'fact' under section 9545(b)(1)(ii) of the PCRA." As the ***Watts*** court noted:

> Law is a principle; fact is an event. Law is conceived; fact is actual. Law is a rule of duty; fact is that which has been according to or in contravention of the rule. Put another way, a "fact," as distinguished from the "law," is that which is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law. Consistent with these definitions, an in-court ruling or published judicial opinion is law, for it is simply the embodiment of abstract principles applied to actual events. The events that prompted the analysis, which must be established by presumption or evidence, are regarded as fact.

Id. at 986–987 (citations, quotations, and punctuation omitted). Thus, no support exists in the PCRA that a petitioner, like appellant, who learns about a rule of law and then files a PCRA petition satisfies the requirements of Section 9545(b)(1)(ii). Nor does appellant direct our attention to Pennsylvania case law supporting his proposition.

Additionally, the principle behind appellant's position that the illegality of his sentence is a "fact" has been flatly rejected by our supreme court, which has continually held that a "fact" that was known to a defendant or one that was readily apparent on the face of the record does not fall within the "after-discovered facts" exception merely because the legal import of the fact was recently discovered. ***See Commonwealth v. Pursell***, 749 A.2d 911, 916-917 (2000) (where facts forming basis for legal claim raised by a PCRA petitioner were readily ascertainable from a review of the record, they did not qualify as "after-discovered" facts). Clearly, the "fact" that his sentence was allegedly illegal could have been ascertained from the record.

Moreover, an untimely petition will not be addressed simply because it is couched in terms of ineffectiveness. ***Commonwealth v. Yarris***, 557 Pa. 12, ___, 731 A.2d 581, 586 (1999). "Appellant's attempt to interweave concepts of ineffective assistance of counsel and after-discovered evidence as a means of establishing jurisdiction is unconvincing." ***Commonwealth v. Gamboa-Taylor***, 562 Pa. 70, 753 A.2d 780 (2000). Although appellant attempts to formulate his assertions in terms of the discovery of new facts

not previously known to him, it is readily apparent that the true essence of his argument is a claim for ineffective assistance of counsel for failing to object to the extensions to his ARD or advise appellant of the consequences of the extensions. (Appellant's brief at 15.) Such a claim will not save this untimely petition. ***See Commonwealth v. Lark***, 560 Pa. 487, ___, 746 A.2d 585, 589-590 (2000) (holding that couching argument in terms of ineffectiveness cannot save a petition that does not fall into exception to jurisdictional time-bar).

Since the provisions of the PCRA regarding timely filing are jurisdictional and appellant failed to file for relief in a timely fashion and failed to establish one of the three exceptions to timely filing, the PCRA court had no jurisdiction to review appellant's PCRA petition or address the underlying claims raised therein. Appellant is entitled to no relief.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2013