NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LEE A. SMITH, III, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1080 MDA 2013

Appeal from the Order of June 7, 2013
In the Court of Common Pleas of Dauphin County
Criminal Division, at No(s): CP-22-CR-0003430-1995

BEFORE: BOWES, OLSON AND FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.: **FILED MAY 13, 2014**

Appellant, Lee A. Smith, III, appeals from an order entered on June 7, 2013 in the Criminal Division of the Court of Common Pleas of Dauphin County that denied his petition to remove or modify certain conditions of his parole. We affirm.

At the conclusion of trial on November 22, 1996, a jury found Appellant guilty of rape by forcible compulsion. Thereafter, on January 10, 1997, the court sentenced Appellant to serve seven to 20 years in a state correctional institution and ordered him to pay a $2,000.00 fine and the costs of prosecution. Appellant received credit for time served prior to the commencement of his sentence.

Appellant filed a motion to modify his sentence, which the trial court denied in January 1997. This Court affirmed Appellant's judgment of

*Retired Justice specially assigned to the Superior Court.

sentence on November 5, 1997, ***Commonwealth v. Smith***, 707 A.2d 553 (Pa. Super. 1997) (unpublished memorandum), and our Supreme Court denied Appellant's petition for allowance of appeal on May 15, 1998. ***Commonwealth v. Smith***, 718 A.2d 784 (Pa. 1998). In August 1998, Appellant filed a *pro se* petition pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After the appointment of counsel, the PCRA court dismissed Appellant's petition in April 1999. This Court affirmed the dismissal of Appellant's PCRA petition in June 2000. ***Commonwealth v. Smith***, 760 A.2d 433 (Pa. Super. 2000) (unpublished memorandum). We later affirmed the dismissal of a second PCRA petition on grounds that the filing was untimely. ***Commonwealth v. Smith***, 852 A.2d 1254 (Pa. Super. 2004) (unpublished memorandum).

Appellant initiated the current proceedings on June 3, 2013 by filing a *pro se* petition to remove or modify conditions of parole set by the Board of Probation and Parole ("Board"). In his petition, Appellant challenged restrictions that forbade him from working, traveling through, or residing in Harrisburg and certain surrounding areas. Petition to Remove or Modify Parole Conditions, 6/3/13, at ¶ 3. Appellant alleged that his employment prospects and living arrangements were centered in those communities and that the restrictions would inhibit his successful reentry into society. ***Id.*** at ¶¶ 11-14. The trial court denied relief on June 7, 2013 and Appellant filed a notice of appeal on June 14, 2013. In response, the court, on June 28, 2013, entered an order pursuant to Pa.R.A.P. 1925(b) that directed

Appellant to file a concise statement of errors complained of on appeal. The certified record does not reflect that Appellant filed or served a concise statement in compliance with the trial court's order. On August 7, 2013, the trial court filed a memorandum in which it declared that Appellant waived his claims on appeal because he failed to file a concise statement and because he never requested an extension of time in which to file a concise statement.

On September 16, 2013, Appellant filed an application for relief with this Court. In his application, Appellant alleged that he filed a concise statement with the Dauphin County Clerk of Courts on July 10, 2013 and that he served copies on both the trial judge and the Commonwealth. Appellant further alleged that the trial court's docket sheet failed to reflect his filing because of a breakdown in the court system, including the possibility of fraud or negligence on the part of the Dauphin County Clerk's office. Appellant therefore attached a concise statement[1] to his application and asked this Court to remand the case to allow him to supplement the record.

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[1] In the concise statement included with Appellant's application for relief, Appellant alleged for the first time in these proceedings that his conviction should be overturned and his sentence discharged because the trial judge did not enter a written judgment of sentence following his rape conviction. Appellant's concise statement failed to raise any issue regarding the basis for his June 3, 2013 petition that serves as the gravamen of his appeal; *i.e.* the restrictions and conditions of parole imposed on him by the Board.

On October 4, 2013, this Court entered an order directing our prothonotary to: (1) provide Appellant a copy of his order of sentence and (2) forward to the trial court a copy of the application seeking to amend or supplement the record with Appellant's concise statement. Our order further directed the trial court to consider Appellant's application for relief as a petition to file his concise statement *nunc pro tunc*. Appellant filed his concise statement with the trial court on November 4, 2013.

The trial court never entered an order that expressly granted or denied Appellant's petition to file his concise statement *nunc pro tunc*. In addition, the trial court did not convene a hearing or otherwise undertake any effort to ascertain whether Appellant's concise statement was timely filed or served, what factors may have led to a filing delay, or whether good cause or extraordinary circumstances justified a *nunc pro tunc* submission. Instead, on December 12, 2013, the trial court filed an opinion addressing the substance of the issues raised in Appellant's concise statement. Initially, the trial court acknowledged that it never entered a written judgment of sentence following Appellant's rape conviction. Nevertheless, the court noted that an on-the-record order set forth in the transcript of Appellant's sentencing hearing confirmed that: (1) Appellant's sentence was imposed in open court with Appellant present; (2) Appellant's sentence was based upon the jury's verdict that Appellant was guilty of rape; (3) Appellant was advised about the duration of his incarceration and the amount of his fines and costs; (4) Appellant's punishment was predicated upon his prior record

score and his potential danger to society; (5) Appellant received credit for all time served to which he was entitled; and (6) Appellant was informed about his post-sentence and appellate rights. Under these circumstances, the trial court rejected the claims advanced in Appellant's concise statement based upon this Court's decision in ***Commonwealth v. Ristau***, 666 A.2d 338 (Pa. Super. 1995).[2] This appeal followed.

In his brief, Appellant raises several claims that assert substantially similar grounds for relief. In each enumerated issue, Appellant essentially argues that his sentence is illegal, and must be vacated, because the trial court never issued a written sentencing order signed by the trial judge. We decline to address the substance of Appellant's contentions, as we find that Appellant has waived appellate review of his claims.

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[2] In ***Ristau***, this Court concluded that a defendant was convicted and sentenced when a trial judge entered a verbal disposition on summary traffic offenses immediately after a bench trial. We noted in that case, as here, that the defendant did not allege: (1) that he was unaware that a sentence had been imposed against him; (2) that he was not apprised of his appellate rights; or, (3) that a verbal pronouncement of sentence implicated double jeopardy concerns. ***Ristau***, 666 A.2d at 340-341. We further note that this Court, in ***Commonwealth v. Green***, 862 A.2d 613, 615 (Pa. Super. 2004) (*en banc*), *appeal denied*, 882 A.2d 477 (Pa. 2005), held that the phrase "imposition of sentence" as used in Pa.R.Crim.P. 720(A) referred to the date that the trial court pronounced sentence in open court. Our holding in ***Green*** suggests strongly that a verbal on-the-record pronouncement of sentence in the presence of the defendant is sufficient to commence the post-conviction mechanics of the criminal justice system, including the process of litigating a direct appeal and transitioning into the custody of the Department of Corrections.

At the outset, we note that Appellant did not comply with the trial court's order pursuant to Rule 1925(b). Ordinarily, the failure to comply with such an order waives appellate review. ***See Commonwealth v. Castillo***, 888 A.2d 775, 780 (Pa. 2005) (affirming bright-line rule that, in order to preserve claims for appellate review, an appellant must comply with a trial court's order to file a concise statement and any issues not raised therein will be deemed waived). We are reluctant to find waiver on this basis under the circumstances of this case, however, in view of Appellant's September 16, 2013 application for relief, our October 4, 2013 order, and ensuing events in the trial court.

Appellant's September 16, 2013 application for relief alleged that he filed a timely concise statement but that a breakdown in the court system precluded entry of his submission on the docket. In our October 4, 2013 order, we directed our prothonotary to forward to the trial court a copy of Appellant's application to supplement the record with his concise statement. Our order also instructed the trial court to consider Appellant's application for relief as a petition to file his concise statement *nunc pro tunc*. Appellant filed his concise statement on November 4, 2013 and, as we have stated above, the trial court never investigated the facts relating to whether Appellant timely filed and served his concise statement and never entered an order that expressly granted or denied Appellant's petition to file his concise statement *nunc pro tunc*. Instead, the trial court issued an opinion on December 12, 2013 addressing the substance of the issues raised in

Appellant's concise statement. Under these circumstances, we read the trial court's opinion as incorporating an order that granted Appellant leave to file his concise statement *nunc pro tunc*. Hence, we decline to find waiver on the basis that Appellant's concise statement was untimely.

Our decision should not be understood as embracing the principle that we may overlook noncompliance with Rule 1925 whenever the trial court issues an opinion addressing the issues raised in an untimely concise statement. Such an approach would clearly conflict with the holdings of our Supreme Court. ***See e.g. Castillo***, 888 A.2d at 780 (finding waiver despite trial court opinion addressing issues in untimely concise statement). To explain our ruling, we look first to Rule 1925(b)(2), which provides:

> (2) *Time for filing and service*.--The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. **Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement *nunc pro tunc*.**

Pa.R.A.P. 1925(b)(2) (emphasis added). To aid in the construction of Rule 1925(b)(2), the commentary to the rule states:

> In general, *nunc pro tunc* relief is allowed only when there has been a breakdown in the process constituting extraordinary circumstances. ***See, e.g. , In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election***, 843 A.2d 1223, 1234 (Pa. 2004) ("We have held that fraud or the wrongful or negligent act of a court official may be a proper reason for holding that a statutory appeal period does not run and that the wrong may be corrected by means of a petition filed nunc pro tunc.")[.] Courts

> have also allowed *nunc pro tunc* relief when "non-negligent circumstances, either as they relate to appellant or his counsel" occasion delay. ***McKeown v. Bailey***, 731 A.2d 628, 630 (Pa. Super. 1999). However, even when there is a breakdown in the process, the appellant must attempt to remedy it within a "very short duration" of time. ***Id.***; ***Amicone v. Rok***, 839 A.2d 1109, 1113 (Pa. Super. 2003) (recognizing a breakdown in process, but finding the delay too long to justify nunc pro tunc relief).

Pa.R.A.P. 1925(b)(2) cmt (parallel citations omitted; emphasis added).

Our Rules of Appellate Procedure permit an appellate court to order remand in a criminal case "for a determination as to whether a [concise s]tatement had been filed and/or served or timely filed and/or served." Pa.R.A.P. 1925(c)(1). In addition, remand is permitted "for the filing of a [concise s]tatement *nunc pro tunc* and for the preparation and filing of an opinion by the judge" where "an appellant in a criminal case was ordered to file a [concise s]tatement and failed to do so, such that the appellate court is convinced that counsel has been *per se* ineffective." Pa.R.A.P. 1925(c)(3).

Because Appellant was acting *pro se*, Rule 1925(c)(3) was not the basis of our remand order. Moreover, our remand order did not instruct the trial court to explore the facts and determine whether a concise statement was timely filed or served. Thus, Rule 1925(c)(1) does not furnish the basis of our order. Instead, our order invited the trial court to consider Appellant's application for relief as a request to file his concise statement *nunc pro tunc*. The authority for such an order appears to emerge from Rule 1925(b)(2) and we seem to have assumed the existence of extraordinary circumstances based upon the allegations set forth in Appellant's application for relief. All

of this is further complicated by the fact that the trial court, following remand, never made an independent determination as to whether Appellant's concise statement was timely filed and served, what factors (if any) led to a delay, and whether exceptional circumstances justified a *nunc pro tunc* submission.

The procedures followed on remand in this case were not fully consistent with the provisions of Rule 1925. Rather than directing the trial court to investigate the facts surrounding Appellant's alleged initial submission, our remand order merely directed the trial court to consider Appellant's application for relief as a petition to file his concise statement *nunc pro tunc*. In turn, the trial court made no finding whatsoever as to the existence of extraordinary circumstances and, instead, issued an opinion on the merits of the claims raised in Appellant's November 4, 2013 concise statement.

In this case, the issue is not whether an admittedly untimely concise statement precludes appellate review despite the fact that the trial court addressed Appellant's claims. If this were the question before us, ***Castillo*** would control and its holding would compel waiver. Our inquiry here, however, is whether waiver must be found where: (1) Appellant alleges a timely submission; (2) Appellant filed a petition averring that extraordinary circumstances caused his filing to be omitted from the trial court's docket sheet; and, (3) the trial court issued an opinion on the merits of the claims

raised in Appellant's concise statement without addressing the alleged existence of extraordinary circumstances. Prior decisions by this Court suggest that the revisions to Rule 1925 require the courts to carefully consider extension requests made under the rule. ***See Commonwealth v. Hopfer***, 965 A.2d 270, 273-274 (Pa. Super. 2009) (remanding for filing of concise statement and Rule 1925(a) opinion where PCRA court failed to adequately explain why appellant failed to show good cause for extension of time in which to file Rule 1925(b) statement).

We are highly skeptical that fraud or negligence on the part of a civil servant prevented not only the timely docketing of Appellant's concise statement but also timely service upon the trial judge and the Commonwealth. For related reasons, we are quite sure that a fully developed record would support waiver in this case pursuant to our Supreme Court's jurisprudence which requires strict compliance with the procedures set forth in Rule 1925. Nevertheless, we are reluctant to find waiver because we cannot overlook the fact that the ambiguous and problematic nature of our remand order might have played some role in depriving Appellant of the opportunity to demonstrate compliance with Rule 1925. Obviously, the better practice under the present circumstances would have been to issue a remand order pursuant to Rule 1925(c)(1). Such an order should have instructed the trial court to determine whether a concise statement was timely filed and served and what causes led to any delay.

Once those determinations were made, the trial court could then apply Rule 1925, as interpreted by our Supreme Court, to the facts as it found them. While a second remand order might resolve some of these gaps in the factual record, our concerns about judicial economy counsel us against this option, especially since the record firmly precludes our review on other grounds (***see infra***). Accordingly, we decline to find waiver on the basis of an untimely concise statement.

Notwithstanding our decision to forgo waiver based upon the application of Rule 1925, our review of the parties' submissions and the certified record reveals alternate reasons that preclude appellate review by this Court. Appellant initiated the present proceedings by filing a petition that challenged certain conditions placed upon his parole by the Board, namely restrictions relating to where he was permitted to work, travel, and reside. Nowhere in his petition did Appellant challenge the legality of his sentence, let alone the precise issue he argues on appeal (*i.e.*, that the trial court's failure to issue a written sentencing order violated Appellant's constitutional rights and invalidated his sentence). Appellant argues in his reply brief that his challenge to the conditions of his parole "opened the door" to the contentions he raises on appeal. Appellant's Reply Brief at 6. However, Appellant's initial reference to the illegality of his sentence (and the specific claim he advances on appeal) came in his concise statement, which he filed after lodging his notice of appeal.

In the present case, we lack jurisdiction over the instant appeal and, therefore, lack the authority to address *sua sponte* Appellant's challenge to the legality of his sentence. Appellant appealed to this Court the trial court's order of June 7, 2013 that denied his petition challenging the conditions placed on his parole by the Board. Appellate review of administrative parole orders, *i.e.*, orders issued by the Board (as in this case) as opposed to parole orders issued by common pleas courts, is within the exclusive jurisdiction of the Commonwealth Court. ***Commonwealth, Department of Corrections v. Reese***, 774 A.2d 1255 (Pa. Super. 2001); 42 Pa.C.S.A. § 763(a) (Commonwealth Court has exclusive jurisdiction of direct appeals from decisions of government agencies such as the Board). Courts of common pleas lack jurisdiction over direct appeals from decisions of the Board. ***Commonwealth v. Fells***, 518 A.2d 544 (Pa. 1986). Because the Commonwealth Court was the proper forum for appealing a decision by the Board, § 724 of the Judicial Code ultimately governs appellate jurisdiction in this case. Section 724 provides that final orders of the Commonwealth Court may be reviewed by the Supreme Court upon allowance of appeal. 42 Pa.C.S.A. § 724(a). Thus, under § 724, our Supreme Court enjoys exclusive appellate jurisdiction over final orders issued by the Commonwealth Court following review of a decision by the Board. More significantly, because this class of appeals falls within the scope of the Supreme Court's exclusive appellate jurisdiction, we lack judicial authority to reach the merits of

Appellant's challenge to the conditions of his parole and cannot address Appellant's illegal sentence claims on appeal *sua sponte*.[3] ***See Commonwealth v. Munday***, 78 A.3d 661, 664 (Pa. Super. 2013) ("A challenge to the legality of the sentence may be raised as a matter of right, is non-waivable, and may be entertained **so long as the reviewing court has jurisdiction**.") (emphasis added).

The foregoing conclusion is not altered by the fact that Appellant raised a challenge to the legality of his sentence in his concise statement or that he asserted in his reply brief that the claims in his petition "opened the door" to a contention that his sentence was unlawful. Although it is firmly established that issues relating to the legality of a sentence may never be

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[3] Our jurisdiction is created by statute:

> The Superior Court derives all of its jurisdiction and powers from statute. Hence, no right of appellate review exists in [this C]ourt in any instance except it be expressly authorized by statute.

Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County, 489 A.2d 1286, 1287-1288 (Pa. 1985). Relevant to our jurisdiction, § 742 of the Judicial Code states:

> **§ 742. Appeals from courts of common pleas**
>
> The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, **except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court**.

42 Pa.C.S.A. § 742 (emphasis added).

waived and may be raised by an appellate court *sua sponte*, ***see e.g. Commonwealth v. Watley***, 81 A.3d 108, 118 (Pa. Super. 2013), this principle does not compel consideration of Appellant's claim in this case. If, as Appellant suggests, he incorporated or included within his petition a challenge to the legality of his sentence, it necessarily follows that Appellant's petition advanced a claim for which the PCRA afforded relief.[4] ***See*** 42 Pa.C.S.A. § 9543(a)(2)(vii) (establishing that imposition of unlawful sentence constitutes grounds for relief under the PCRA). Where a petition asserts claims for which the PCRA affords relief, the PCRA operates as the sole means for collateral attack. ***Commonwealth v. Lantzy***, 736 A.2d 564, 570 (Pa. 1999) (PCRA serves as exclusive avenue of relief within the arena in which it operates); ***Commonwealth v. Hall***, 771 A.2d 1232, 1235 (Pa. 2001) (plain language of PCRA demonstrates General Assembly's clear intent that claims that could be brought under PCRA must be brought under that Act); ***Commonwealth v. Yarris***, 731 A.2d 581, 586 (Pa. 1999) (by its own language, and by judicial decisions interpreting that language, PCRA is sole means for obtaining state collateral relief for claims cognizable under PCRA); ***Commonwealth v. Ahlborn***, 699 A.2d 718, 721 (Pa. 1997) (PCRA "specifies that it is the sole means of obtaining collateral relief, and that it

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[4] A review of Appellant's June 3, 2013 petition establishes that, contrary to Appellant's suggestion, he did not raise a challenge to the legality of his sentence in said petition. The first reference to the illegality of his sentence was made in his concise statement.

supersedes common law remedies"). "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, 223 (Pa. 1999).

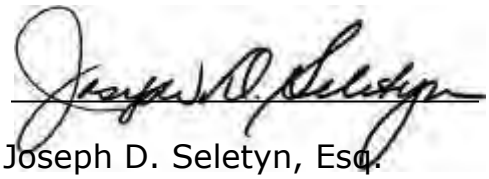
As stated in our recitation of the procedural history of this case, Appellant was convicted in 1996 and sentenced in 1997 and a prior panel of this Court determined that Appellant's second petition under the PCRA was untimely. Within the context of the present litigation, Appellant has not advanced any exceptions to the PCRA's timeliness requirements. Thus, neither the trial court nor this Court has jurisdiction to entertain Appellant's untimely challenge to the legality of his sentence.

Appellant in this case filed a petition with the trial court to challenge certain conditions of his parole imposed by the Board. Such a petition falls outside the PCRA, but neither the trial court nor this Court possess the judicial authority to address such claims. After the petition was denied, Appellant, by way of his concise statement and briefs on appeal, raised a challenge to the legality of his sentence, a collateral claim for which relief **is** available under the PCRA. However, such a claim was patently time-barred and Appellant never established an exception to the PCRA's timeliness requirements. This Court cannot permit Appellant to circumvent the jurisdictional requirements of the PCRA by initiating a proceeding that falls outside the scope of the post-conviction statute and subsequently raising on

appeal a time-barred collateral claim such as a challenge to the legality of his sentence. Such efforts clearly contravene the intent of the legislature which is to make the PCRA, and its attendant jurisdictional requirements, the exclusive pathway for collateral relief. Accordingly, we affirm the order entered by the trial court.

Order affirmed. Appellant's "appeal of memorandum opinion" denied with prejudice.[5]

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/13/2014

[5] On January 15, 2014, we issued an order denying, without prejudice, Appellant's January 13, 2014 "appeal of memorandum opinion." Appellant's "appeal of memorandum" requested relief on grounds largely identical to those raised in Appellant's opening and reply briefs. For the reasons above, we now deny Appellant's January 13, 2014 request for relief with prejudice.