

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ROBERT DA-JUAN GAINES

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1497 MDA 2013

Appeal from the PCRA Order July 15, 2013
In the Court of Common Pleas of Franklin County
Criminal Division at No(s): CP-28-CR-0001303-2009

BEFORE: BENDER, P.J.E., MUNDY, J., and JENKINS, J.

MEMORANDUM BY MUNDY, J.:

FILED JULY 14, 2014

Appellant, Robert Da-Juan Gaines, appeals from the July 15, 2013 order dismissing his first petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we quash this appeal.

We summarize the relevant facts and procedural history of this case as follows. On September 8, 2009, the Commonwealth filed an information charging Appellant with two counts each of unlawful delivery of a controlled substance, criminal conspiracy and criminal use of a communication facility.¹ On October 11, 2010, Appellant proceeded to a jury trial, at the conclusion of which the jury found Appellant guilty of all counts except for one count of

¹ 35 P.S. § 780-113(a)(30), 18 Pa.C.S.A. §§ 903(a)(1), and 7512(a), respectively.

unlawful delivery of a controlled substance. On November 17, 2010, the trial court imposed an aggregate sentence of 102 to 360 months' imprisonment. On December 17, 2010, Appellant filed a timely notice of appeal to this Court. This Court affirmed the judgment of sentence on August 15, 2011. ***Commonwealth v. Gaines***, 32 A.3d 834 (Pa. Super. 2011) (unpublished memorandum). Appellant did not file a petition for allowance of appeal with our Supreme Court.

On September 14, 2012, Appellant filed a timely counseled PCRA petition. Among the claims therein, Appellant argued that "[his c]ounsel failed to bring to the attention of the [s]entencing [c]ourt the miscalculation of [his prior record score], leading to a standard range sentence that did not accurately reflect a proper calculation of his prior record." Appellant's PCRA Petition, 9/14/12, at ¶ 6. The Commonwealth filed its answer on October 8, 2012. On April 12, 2013, the PCRA court entered an order scheduling resentencing in accordance with a stipulation between Appellant and the Commonwealth that Appellant's original sentence was based on an improperly calculated prior record score.² On April 25, 2013, Appellant filed a petition to amend his PCRA petition, which the PCRA court granted on May

² The PCRA court's order appears to grant Appellant relief without specifically concluding that prior counsel was ineffective. **See** PCRA Court Order, 4/12/13, at 2 (stating, "there is no finding for th[e PCRA c]ourt to make as to ineffective assistance of counsel as the matter is being addressed by the [PCRA c]ourt as to that issue[]").

1, 2013. Appellant filed an amended PCRA petition on May 21, 2013. The PCRA court conducted a hearing on June 19, 2013. On July 15, 2013, the PCRA court entered an order denying Appellant's request for PCRA relief; however, the record reveals that the clerk of courts did not mail said order to Appellant until July 17, 2013. On July 17, 2013, the PCRA court resentenced Appellant to an aggregate term of 64 to 156 months' imprisonment with credit for time served. On July 29, 2013, Appellant filed a motion to modify sentence, which was granted the next day to include that Appellant was RRRI eligible. On August 19, 2013, Appellant filed a notice of appeal.³

On appeal, Appellant raises one issue for our review.

- A. [Whether the] ineffectiveness of trial counsel resulted in a conviction that was unjustly reached[?]

Appellant's Brief at 4.

Before we may reach the merits of Appellant's issue, we must first determine whether this appeal is properly before us. We may raise issues concerning our appellate jurisdiction *sua sponte*. **Commonwealth v. Andre**, 17 A.3d 951, 957-958 (Pa. Super. 2011). In order to invoke our appellate jurisdiction, Pennsylvania Rule of Appellate Procedure 903 requires that all "notice[s] of appeal ... shall be filed within 30 days after the entry of

³ Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

the order from which the appeal is taken.” Pa.R.A.P. 903(a). Since this filing period is jurisdictional in nature, it must be strictly construed and “may not be extended as a matter of indulgence or grace.” **Commonwealth v. Pena**, 31 A.3d 704, 706 (Pa. Super. 2011) (citation omitted).

In general, appeals are properly taken from final orders. **See** Pa.R.A.P. 341(b)(2) (stating an appeal lies from an order that “is expressly defined as a final order by statute[.]”). Appellant’s entire argument on appeal pertains to ineffectiveness of counsel, which stems from the July 15, 2013 order denying his claims for relief under the PCRA. **See** Appellant’s Brief at 1 (stating, “[t]his is an appeal from [the PCRA court’s order] dated July 15, 2013 on the preserved issue of the [PCRA c]ourt’s denial of the [PCRA p]etition filed on September 14, 2012 and [the amended PCRA petition] filed May 21, 2013[.]”). Pennsylvania Rule of Criminal Procedure 910 governs PCRA appeals and provides as follows.

An order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal.

Pa.R.Crim.P. 910.

In the case *sub judice*, the PCRA court’s July 15, 2013 order disposed of all of his claims for relief under the PCRA. Furthermore, in **Commonwealth v. Bryant**, 780 A.2d 646 (Pa. 2001), our Supreme Court held that when a PCRA court denies all claims of relief with respect to the

guilt phase, but orders a new sentencing hearing, its order is a final one. **Id.** at 648.

In **Bryant**, the PCRA court denied the appellant's petition for relief in all respects as to the guilt phase of his trial, but did order a new sentencing hearing. **Bryant, supra** at 647. Our Supreme Court reviewed whether this Court properly quashed the appellant's appeal from the PCRA court's denial of relief as to his guilt-phase issues because he had not been re-sentenced. **Id.** at 648. In explaining why the appellant's appeal should not have been quashed, our Supreme Court highlighted factors that explained the inefficiency of such fragmented appellate review.

Re-sentencing the defendant before engaging in appellate review of the denial of PCRA relief ... results in piecemeal litigation, delay in the determination of guilt phase issues, and potential misuse of judicial resources if the new sentence is rendered moot by subsequent disposition of the guilt phase issues. For these reasons, the orderly administration of justice requires that review of the PCRA court's decision denying guilt phase relief should precede the imposition of a new sentence by the trial court.

Id. As a result, our Supreme Court vacated this Court's quashal order. **Id.**

It is true that the case *sub judice* has a slightly different procedural posture insofar that the PCRA court has already resentenced Appellant, as opposed to merely rescheduling a new sentencing hearing. In our view, this does not affect the finality of the PCRA court's July 15, 2013 order, nor does it render **Bryant** meaningfully distinguishable. As a result, we are constrained to conclude that the PCRA court's July 15, 2013 order was a final

appealable order under Rule 910.⁴ However, as this order was not mailed to Appellant until July 17, 2013, the appeal period did not begin until this date. **See** Pa.R.A.P. 108(a)(1) (stating, “in computing any period of time under these rules involving the date of entry of an order by a court or other government unit, the day of entry shall be the day the clerk of the court or the office of the government unit mails or delivers copies of the order to the parties ...[.]”). Therefore, Appellant’s notice of appeal was due 30 days from July 17, 2013, which was August 16, 2013. Appellant’s notice of appeal in this case was not filed until August 19, 2013, three days past the Rule 903 filing deadline.⁵

Based on the foregoing, we conclude that Appellant’s notice of appeal was untimely as it was filed 33 days after the Rule 903 period began to run when the PCRA court mailed its order to Appellant. Accordingly, we conclude that we are without jurisdiction, and quash this appeal.

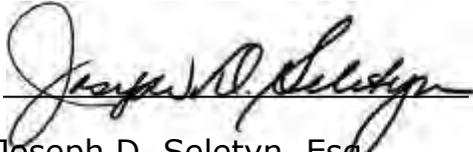
Appeal quashed.

⁴ The PCRA court’s July 15, 2013 order included the required notification that Appellant had 30 days to appeal, and cited to Rule 910. **See** PCRA Court Order, 7/15/13, at 1; Pa.R.Crim.P. 908(E)(stating, “[i]f the judge disposes of the case ... when the defendant is not present in open court, the judge ... shall advise the defendant of the right to appeal from the final order disposing of the petition and of the time limits within which the appeal must be filed[.]”).

⁵ We note that Appellant’s notice of appeal was dated August 19, 2013 as well. **See** Appellant’s Notice of Appeal, 8/19/13, at 1.

P.J.E. Bender concurs in the result. Judge Jenkins files a dissenting statement.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/14/2014