

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ANDREW JUSTIN BERGER

Appellant

No. 2103 MDA 2013

Appeal from the PCRA Order of September 12, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No.: CP-36-CR-0003596-2009

BEFORE: PANELLA, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED JUNE 18, 2014

Andrew Justin Berger appeals from the September 12, 2013 order that dismissed his petition for collateral relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. As the Commonwealth forthrightly concedes, Berger's sentence is illegal. Accordingly, we vacate Berger's judgment of sentence, and we remand for resentencing.

The underlying facts of this case are not in dispute. On July 25, 2009, the New Holland Borough Police Department encountered Berger as the police were en route to respond to a citizen complaint of someone discharging a firearm in a field at night. After confronting Berger, the officers discovered that he was in possession of a 20-gauge sawed-off

* Retired Senior Judge assigned to the Superior Court.

shotgun and live ammunition. By virtue of a juvenile delinquency adjudication for robbery, **see** 18 Pa.C.S. § 3701(a)(1), Berger is prohibited from possessing a firearm pursuant to 18 Pa.C.S. § 6105(a)(1). Berger was charged with persons not to possess a firearm, possession of a prohibited offensive weapon, public drunkenness, and possession of drug paraphernalia.¹ Ultimately, the Commonwealth withdrew the drug paraphernalia and public drunkenness charges.

On September 1, 2011, Berger filed a motion seeking to suppress the shotgun, as well as various statements he made to police at the time of his arrest. That same day, the trial court scheduled a hearing on Berger's suppression motion. Prior to the suppression hearing, the parties reached a plea agreement. On September 14, 2011, Berger entered a negotiated guilty plea. In exchange for Berger pleading guilty to one count of persons not to possess a firearm, the Commonwealth *nolle prossed* Berger's remaining offensive weapons charge. **See** Notes of Testimony ("N.T."), 9/14/2011, at 2. On the agreed charge, graded as a second-degree felony, Berger was sentenced to serve a term of three to ten years' incarceration. He also was directed to pay a fine and the costs of prosecution. **Id.** at 16.

¹ 18 Pa.C.S. §§ 6105(a)(1), 908(a), 5505, and 35 P.S. § 780-113(a)(32), respectively.

Upon the advice of Berger's physician,² the court delayed the start of Berger's sentence. Accordingly, Berger actually began to serve his sentence on October 21, 2011.

Berger did not file a direct appeal from his guilty plea. On October 11, 2012, Berger filed a timely PCRA petition, his first. Berger asserted various claims in his PCRA petition, including that trial counsel was ineffective in a variety of ways and that Berger's sentence is illegal. On October 23, 2012, the PCRA court granted Berger leave to proceed *in forma pauperis* and appointed counsel to represent him.

On March 1, 2013, Berger's counsel submitted a **Turner/Finley** "no merit" letter³ stating that all of Berger's appellate issues were frivolous. That same day, Berger's counsel also mailed a letter to Berger informing him of counsel's intention to withdraw. On or about March 27, 2013, Berger sent a response to the PCRA court objecting to counsel's characterization of Berger's appeal. On June 18, 2013, the PCRA court entered a notice of its intent to dismiss Berger's appeal without a hearing pursuant to Pa.R.Crim.P. 907. On June 28, 2013, Berger responded by letter to the PCRA court's notice of intention to dismiss. On September 12, 2013, the PCRA court dismissed Berger's PCRA petition and granted counsel's petition to withdraw.

² Berger apparently was suffering from "an infection of his right ankle which had required surgery." Memorandum and Order, 9/12/2013, at 2.

³ **See Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988).

On October 15, 2013, Berger filed a *pro se* notice of appeal. The next day, the PCRA court ordered Berger to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On November 6, 2013, Berger timely complied. On December 3, 2013, the PCRA court issued its Rule 1925(a) opinion.

Berger has raised two issues for our consideration:

- A. Did [Berger] “file” his Notice of Appeal in a timely manner when he placed it in his prison’s mail system on October 11, 2013?
- B. Does Berger’s [three] to [ten-]year prison sentence exceed the lawful maximum for a violation of 18 Pa.C.S. § 6105(c)(7), and did the PCRA [c]ourt err when it found that Berger’s sentence was legal?

Brief for Berger at 4. As Berger apparently has anticipated, we must begin by assessing the timeliness of his notice of appeal. Pennsylvania law sets forth a thirty-day period in which petitioners must file a notice of appeal. **See** Pa.R.A.P. 903(a). “Time limitations on the taking of appeals are strictly construed and cannot be extended as a matter of grace.” **Commonwealth v. Perez**, 799 A.2d 848, 851 (Pa. Super. 2002) (citing **Commonwealth v. Hottinger**, 537 A.2d 1, 3 (Pa. Super. 1987)). Notwithstanding this bright-line requirement, Pennsylvania also has recognized the “prisoner’s mailbox rule,” which operates as follows:

[W]hen the appellant is (a) acting *pro se* and (b) incarcerated at the time he or she seeks to file an appeal, justice requires the appeal to be deemed “filed” on the date that the appellant deposits the appeal with prison authorities and/or places it in the prison mailbox. The appellant bears the burden of proving that

he or she in fact delivered the appeal within the appropriate time period. This rule is appropriately termed the “prisoner mailbox” rule.

Commonwealth v. Jones, 700 A.2d 423, 425-26 (Pa. 1997) (citing ***Houston v. Lack***, 487 U.S. 266, 270-71 (1988); ***Smith v. Penna. Bd. of Probation & Parole***, 683 A.2d 278, 279-81 (Pa. 1996)). “[T]he prisoner mailbox rule is applicable to petitions filed pursuant to the PCRA.” ***Commonwealth v. Little***, 716 A.2d 1287, 1289 (Pa. Super. 1998). “[W]e are inclined to accept **any reasonably verifiable evidence** of the date that the prisoner deposits the appeal with the prison authorities.” ***Perez***, 799 A.2d at 851 (citing ***Jones***, 700 A.2d at 426) (emphasis added).

Instantly, Berger had thirty days from the September 12, 2013 dismissal of his PCRA petition to file a timely notice of appeal. We calculate that the last day of that period fell on October 12, 2013, which is a Saturday. Therefore, Berger actually had until Monday, October 14, 2013, to file a timely notice of appeal, or to avail himself of the benefit of the prisoner mailbox rule. **See** 1 Pa.C.S. § 1908 (“When any period of time is referred to in any statute, such period in all cases . . . shall be computed so as to exclude the first and include the last day of such period. Whenever the last day of any such period shall fall on Saturday or Sunday, . . . such day shall be omitted from the computation.”). Berger’s notice of appeal is time-stamped as having been filed on October 15, 2013, at 10:11 a.m., and the

relevant documents are dated as having been submitted to the prison mail system on October 11, 2013.

Based upon the timing of the letter's arrival at the clerk of courts for filing, we conclude that Berger has presented "reasonably verifiable evidence" that his notice of appeal was submitted to the prison mail system on or about the end of the applicable period (October 14, 2013). The only way that Berger's notice of appeal could have been untimely submitted to the prison mail system would be if Berger sent his notice of appeal to the clerk of courts on the same day that the clerk of courts filed it (October 15, 2013). Because the notice of appeal was date-stamped at 10:11 a.m. on October 15, 2013, Berger's notice of appeal would have had to have been deposited in the prison mail system on the morning of October 15, 2013, and arrived at the clerk of courts for filing before 10:11 a.m. Given the inherent delay in transferring letters through **any** mail system, it would defy logic to suppose that the clerk of courts would have been physically capable of filing Berger's notice on the same day that Berger putatively deposited it in the prison mail system. Accordingly, we conclude that Berger must have deposited his letter in the prison mail system by October 14, 2013, at the latest, and we will consider his notice of appeal timely pursuant to the prisoner's mailbox rule. ***Jones, supra.***

We turn now to the merits of Berger's remaining claim. In relevant part, Berger argues that his sentence is illegal. However, it is actually the

Commonwealth, which concedes that Berger's claim is meritorious,⁴ that presents the most succinct statement of this issue:

[Berger] was charged with persons not to possess a firearm, [18 Pa.C.S. § 6105(a)(1)], based on an ineligibility that resulted from a juvenile adjudication. There is no specific grading provision for individuals who are prohibited from possessing a firearm due to a juvenile adjudication. As such, [Berger's] offense should have been graded as a [first-degree misdemeanor]. Therefore, [Berger's] sentence of not less than three nor more than ten years['] imprisonment is illegal.

Brief for Commonwealth at 4.

Our standard of review in this context is well-established:

"On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error." **Commonwealth v. Calhoun**, 52 A.3d 281, 284 (Pa. Super. 2012) (citation omitted). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." **Commonwealth v. Garcia**, 23 A.3d 1059, 1061 (Pa. Super. 2011) (internal quotation marks and citation omitted). "The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review." **Commonwealth v. Johnson**, 966 A.2d 523, 532 (Pa. 2009) (internal quotation marks and citations omitted).

Commonwealth v. Nero, 58 A.3d 802, 805 (Pa. Super. 2012) (internal citations modified).

⁴ The PCRA court argues in its Rule 1925(a) opinion that Berger's Rule 1925(b) statement is "too vague to permit the Court to address the issue presented and should be deemed a waiver of all claims for appellate review." PCRA Court Opinion, 12/3/2013, at 2-3. We disagree. Berger's Rule 1925(b) statement clearly identifies, and cogently describes, the dispositive issue in this case. **See** Berger's Rule 1925(b) Statement, 11/6/2013, at 2-3 ¶3. We conclude that Berger adequately has preserved this issue, and we decline to find waiver.

The scope and standard of review applied to determine the legality of a sentence are well established. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court's application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.

Commonwealth v. Poland, 26 A.3d 518, 523-24 (Pa. Super. 2011) (citing ***Commonwealth v. Mears***, 972 A.2d 1210, 1211 (Pa. Super. 2009)). “[C]laims concerning the illegality of the sentence are not waivable.” ***Commonwealth v. Vasquez***, 744 A.2d 1280, 1284 (Pa. 2000) (citing ***Commonwealth v. Smith***, 598 A.2d 268, 270 (Pa. 1991)).

Instantly, Berger pleaded guilty to violating subsection 6105(a)(7) of the Uniform Firearms Act (“UFA”). Specifically, Berger was found to be in illegal possession of a firearm, 18 Pa.C.S. § 6105(a)(1), which he was prohibited from doing pursuant to his juvenile adjudication for burglary. **See** 18 Pa.C.S. § 6105(c)(7) (“[T]he following persons shall be subject to the prohibition of subsection (a): . . . (7) A person who was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 (relating to adjudication) . . . as a result of conduct which if committed by an adult would constitute an offense under section[] . . . 3701.”). Berger’s offense was graded as a second-degree felony, and he was sentenced to a term of three to ten years’ incarceration. The statutory provision which permits sentencing courts to grade a violation of subsection 6105(a)(1) as a second-degree felony reads, in pertinent part, as follows:

§ 6105. Persons not to possess, use, manufacture, control, sell or transfer firearms.

* * *

(a.1) Penalty.—

(1) A person **convicted** of a felony enumerated **under subsection (b)** or a felony under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, . . . who violates subsection (a) commits a **felony of the second degree**.

18 Pa.C.S. § 6105 (emphasis added).

Berger was not convicted of an offense pursuant to subsection 6105(b). In point of fact, Berger was never “convicted” of **any** crimes when he was adjudicated delinquent as a minor: “An order of disposition or other adjudication in a proceeding under this chapter is **not** a conviction of crime” 42 Pa.C.S. § 6354(a); **see Commonwealth v. Hale**, 85 A.3d 570, 579 (Pa. Super. 2014) (“[T]he legislature, within [section] 6105, plainly differentiated between convictions and adjudications of delinquency.”). Rather, Berger was **adjudicated delinquent** pursuant to 18 Pa.C.S. § 3701, which is one of the predicate offenses listed under subsection 6105(c). Therefore, Berger’s conviction was not subject to the grading terms of subsection 6105(a.1)(1) reproduced above. This is the same conclusion that a panel of this Court announced in **Hale**:

Consistent with both the technical and popular meaning of a conviction, juvenile adjudications are ordinarily not considered convictions. . . . [T]he Juvenile Act explicitly denotes juvenile delinquency adjudications are not convictions. Hence, juveniles are not convicted of delinquent acts.

* * *

The legislature itself in [section] 6105 distinguished between convictions and juvenile adjudications. **See** 18 Pa.C.S. § 6105(c). Thus, the General Assembly was aware of the difference between a person adjudicated delinquent and a person convicted of a crime. . . . In this regard, subsection (c)'s inclusion of juvenile adjudications subjecting a person to violations of the persons not to possess a firearm crime would be unnecessary if convictions under subsection (b) subsumed delinquent acts. Accordingly, under the plain language of the statute, **juvenile adjudications are not convictions that trigger the grading provision of subsection [6105](a.1)(1).**

85 A.3d at 582 (emphasis added, footnote omitted). In the absence of the grading provision at subsection 6105(a.1)(1), there is no specific grading provision provided for violations of subsection 6105(a)(1) based upon a prior juvenile adjudication at subsection 6105(c). Thus, Berger's conviction for illegally possessing a firearm is subject to the catch-all grading provision of the UFA, which states that "[e]xcept as otherwise specifically provided, an offense under this subchapter constitutes a **misdemeanor of the first degree.**" 18 Pa.C.S. § 6119 (emphasis added).

In the instant case, Berger was charged with a violation of subsection 6105(a)(1), graded as a second-degree felony. **See** Information, 9/29/2009, at 1 (describing Berger's charge pursuant to subsection 6105(a)(1) as a second-degree felony). Moreover, the sentencing court calculated Berger's term of incarceration with the violation of subsection 6105(a)(1) graded as a second-degree felony. N.T. at 16 (same). Given

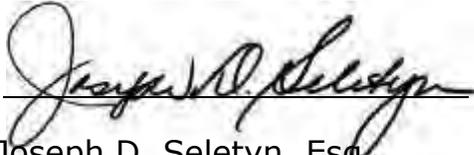
the foregoing discussion, this was error. In the absence of a triggering **conviction** under subsection 6105(b), the sentencing court erred in using Berger's juvenile adjudication to grade his person not to possess a firearm offense as a second-degree felony under subsection 6105(a.1)(1). **Hale, supra.** "The statutory maximum sentence for misdemeanors of the first degree misdemeanor is five years' imprisonment." **Commonwealth v. Musau**, 69 A.3d 754, 757 (Pa. Super. 2013) (citing 18 Pa.C.S. § 106(b)(6), (e)). As such, Berger's sentence of three to ten years' imprisonment is illegal.

Accordingly, we reverse the PCRA court's order dismissing Berger's PCRA petition, we vacate Berger's judgment of sentence, and we remand for resentencing consistent with this memorandum. On remand, we direct the sentencing court accurately to grade Berger's conviction under subsection 6105(a)(1) when crafting the new sentence. However, we make no comment regarding the specific terms of Berger's sentence, as such a determination is committed to the sound discretion of the sentencing court. **See Hale**, 85 A.3d at 585 ("In short, the court may sentence Appellant more harshly due to his prior juvenile record, but it must do so within the confines of a misdemeanor of the first-degree offense.").

Order reversed. Judgment of sentence vacated. Case remanded for resentencing consistent with this memorandum. Jurisdiction relinquished.

J-S29026-14

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: 6/18/2014