

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOHN H. COHEN

Appellant

v.

MARK V. CAPOZZA

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1803 WDA 2015

Appeal from the Order October 27, 2015
In the Court of Common Pleas of Mercer County
Criminal Division at No(s): 32 CR 1987

BEFORE: GANTMAN, P.J., OLSON, J., and FITZGERALD, J.*

JUDGMENT ORDER BY GANTMAN, P.J.:

FILED APRIL 26, 2016

Appellant, John H. Cohen, appeals *pro se* from the order entered in the Mercer County Court of Common Pleas, which denied his *pro se* serial petition for collateral relief (labeled a petition for writ of *habeas corpus ad subjiciendum*), per the Post Conviction Relief Act ("PCRA"), at 42 Pa.C.S.A. §§ 9541-9546. On May 18, 1987, a jury convicted Appellant of first-degree murder and attempted murder. The court sentenced Appellant on June 3, 1988, to life imprisonment for the murder conviction and a consecutive 3½-7 years' imprisonment for the attempted murder conviction. This Court affirmed the judgment of sentence on May 24, 1989, and our Supreme Court denied allowance of appeal on May 25, 1990. ***See Commonwealth v. Cohen***, 563 A.2d 188 (Pa.Super. 1989), *appeal denied*, 525 Pa. 610, 577

*Former Justice specially assigned to the Superior Court.

A.2d 542 (1990). On September 30, 2015, Appellant filed the current petition for writ of *habeas corpus ad subjiciendum* in the civil division, challenging his criminal conviction and sentence.¹ The court treated Appellant's filing as a serial PCRA petition and issued appropriate notice per Pa.R.Crim.P. 907 on October 6, 2015. Appellant filed a *pro se* response on October 21, 2015. On October 27, 2015, the court denied the PCRA petition as untimely. Appellant timely filed a notice of appeal on November 9, 2015. The next day, the court ordered Appellant to file a concise statement per Pa.R.A.P. 1925(b); Appellant timely complied on November 30, 2015.

Preliminarily, any petition for post-conviction collateral relief will generally be considered a PCRA petition, even if captioned as a request for *habeas corpus* relief, if the petition raises issues for which the relief sought is available under the PCRA. **See Commonwealth v. Peterkin**, 554 Pa. 547, 722 A.2d 638 (1998); 42 Pa.C.S.A. § 9542 (stating PCRA shall be sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for same purpose). The writ of *habeas corpus* continues to exist as a separate remedy only if the claim raised is not cognizable under the PCRA. **Peterkin, supra** at 552, 722 A.2d at 640. As well, the timeliness of a PCRA petition is a jurisdictional requisite. **Commonwealth v. Turner**, 73 A.3d 1283 (Pa.Super. 2013), *appeal denied*,

¹ The filing was subsequently transferred to the criminal division.

625 Pa. 649, 91 A.3d 162 (2014). A PCRA petition must be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment is deemed final at the conclusion of direct review or at the expiration of time for seeking review. 42 Pa.C.S.A. § 9545(b)(3). The exceptions to the PCRA time-bar allow for very limited circumstances under which the late filing of a petition will be excused; a petitioner asserting an exception must file a petition within 60 days of the date the claim could have been presented. **See** 42 Pa.C.S.A. § 9545(b)(1-2).

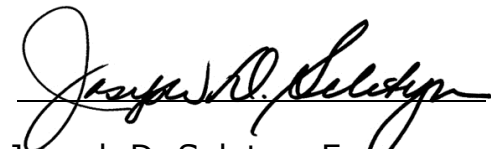
Instantly, Appellant attacks his first-degree murder conviction and life sentence, claiming the Commonwealth did not specifically charge him with first-degree murder,² the court lacked statutory authority to impose a life sentence, and the court lacked authority to instruct the jury on first-degree murder where Appellant's case was not a capital case. Despite his effort to distance his current petition from the PCRA, Appellant's challenges to the legality of his conviction and sentence are cognizable under the PCRA. **See Commonwealth v. Fowler**, 930 A.2d 586 (Pa.Super. 2007), *appeal denied*, 596 Pa. 715, 944 A.2d 756 (2008) (holding any collateral attack on legality of sentence must be raised in PCRA petition); **Guarrasi v. Scott**, 25 A.3d 394 (Pa.Cmwlt. 2011) (stating plaintiff cannot use civil action to wage collateral attack on his criminal proceedings). Thus, the court properly

² The record makes clear the Commonwealth charged Appellant with first and third degree murder along with other offenses.

treated Appellant's most recent prayer for collateral relief as a PCRA petition. **See Peterkin, supra.** Further, Appellant's judgment of sentence became final on August 23, 1990, upon expiration of the time to file a petition for writ of *certiorari* with the United States Supreme Court. **See** U.S.Sup.Ct.R. 13. Appellant filed the current, *pro se* serial petition for collateral relief on September 30, 2015, which is patently untimely.³ **See** 42 Pa.C.S.A. § 9545(b)(1). In his effort to keep his petition outside the PCRA, Appellant did not plead or prove any of the statutory exceptions required to revive an otherwise untimely PCRA petition. **See** 42 Pa.C.S.A. § 9545(b)(1). Thus, Appellant's petition remains an untimely PCRA petition, and the court properly denied relief. Accordingly, we affirm.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/26/2016

³ The docket entries in Appellant's criminal case indicate the present petition is at least his second petition for collateral relief.

