NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TERRENCE L. FITZPATRICK	:	
Appellant	:	No. 3098 EDA 2017

Appeal from the PCRA Order December 5, 2016
In the Court of Common Pleas of Northampton County Criminal Division
at No(s): CP-48-CR-0000713-2007

BEFORE: BENDER, P.J.E., BOWES, J., and STEVENS*, P.J.E.

MEMORANDUM BY BOWES, J.: **FILED MAY 25, 2018**

Terrence L. Fitzpatrick appeals from the order denying his third petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

In 2008, a jury convicted Appellant of attempted homicide and related offenses, and the trial court sentenced him to an aggregate prison term of twenty to forty years incarceration. This Court affirmed his judgment of sentence on March 8, 2010, and our Supreme Court denied allowance of appeal on August 31, 2010. ***See Commonwealth v. Fitzpatrick***, 996 A.2d 540 (Pa.Super. 2010) (unpublished memorandum), *appeal denied*, 4 A.3d 157 (Pa. 2010).

Appellant filed a timely PCRA petition, which was dismissed in 2012. This Court affirmed the dismissal, and our Supreme Court denied allowance of appeal. ***See Commonwealth v. Fitzpatrick***, 68 A.3d 353 (Pa.Super.

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* Former Justice specially assigned to the Superior Court.

2013) (unpublished memorandum), *appeal denied*, 69 A.3d 600 (Pa. 2013). On June 30, 2015, Appellant filed a *pro se* "*Habeas Corpus* Motion to Modify and Correct Illegal Sentence *Nunc Pro Tunc,*" which was denied on August 3, 2015.[1]

On August 28, 2015, Appellant filed the instant *pro se* PCRA petition, which we consider his third. On November 3, 2016, the PCRA court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss the petition without a hearing. Appellant filed a *pro se* response, and the the PCRA court dismissed the petition on December 5, 2016.

The PCRA court docket reflects no further activity until September 25, 2017, when Appellant filed a *pro se* notice of appeal. We issued a rule to show cause why the appeal should not be quashed as untimely filed from the December 5, 2016 dismissal order. ***See*** Pa.R.A.P. 903(a) (providing that the notice of appeal shall be filed within 30 days after the entry of the order from which the appeal is taken). Appellant filed a *pro se* response, claiming that he filed a *pro se* notice of appeal on December 26, 2016, within the 30-day appeal period, albeit in the Superior Court rather than in the PCRA court.

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[1] Although Appellant styled the motion as a "Habeas Corpus Motion to Modify and Correct Illegal Sentence *Nunc Pro Tunc,*" the PCRA court should have treated it as his second petition filed pursuant to the PCRA. ***See*** 42 Pa.C.S. § 9542 (providing that "[t]he action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including *habeas corpus* . . . .").

Appellant posits that the Superior Court should have forwarded the notice of appeal to the PCRA court. Appellant attached to his response copies of a *pro se* notice of appeal (dated December 26, 2016), certificate of service upon the Northampton County prothonotary (dated December 26, 2016), and a certificate of service indicating that he mailed the *pro se* notice of appeal on January 4, 2016.[2] None of these items is time-stamped, or bears any indicia of filing. However, Appellant also attached a prison cash slip dated December 26, 2016, for postage on a mailing to the "Superior Court of Pa." at its Harrisburg address.

Initially, we observe that Pennsylvania Rule of Criminal Procedure 907(4) imposes certain requirements on the PCRA court when a petition is dismissed without a hearing:

> When the petition is dismissed without a hearing, the judge promptly shall issue an order to that effect and shall advise the defendant by **certified mail**, **return receipt requested**, 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. The order shall be filed and served as provided in Rule 114.

Pa.R.Crim.P. 907(4) (emphasis added). Pursuant to Rule 114, service shall be in writing by "sending a copy to an unrepresented party by certified, registered, or first class mail addressed to the party's place of . . .

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[2] When a *pro se* appellant is incarcerated, as is the case herein, an appeal is deemed filed on the date the prisoner deposits the appeal with prison authorities or places it in a prison mailbox. ***See Commonwealth v. Chambers***, 35 A.3d 34, 38 (Pa.Super. 2011).

confinement." Pa.R.Crim.P. 114(B)(3)(a)(v). Further, the docket entries shall contain the date of receipt in the clerk's office of the order, the date appearing on the order, and the date of service of the order. Pa.R.Crim.P. 114(C).

Here, the docket entries confirm that the clerk of courts docketed the order dismissing Appellant's third PCRA petition on December 5, 2016, and that the order was served on Appellant on December 7, 2016. ***See*** Pa.R.Crim.P. 114(C). However, the docket reflects that the PCRA court failed to comply with the explicit requirements of Rule 907(4). Rather than mailing the dismissal order to Appellant by certified mail, return receipt requested, the PCRA court mailed the order via first class mail. If the PCRA court had complied with the service and substance requirements of the rule, we could be confident that Appellant had, in fact, promptly received the order dismissing the petition and had been advised of the applicable time limits within which to file an appeal.

Moreover, Appellant's cash slip, bearing the date of December 26, 2016, for postage to the "Superior Court of Pa." at its Harrisburg address, is evidence that Appellant gave the notice of appeal to prison authorities or placed it in the prison mailbox within the thirty-day filing period.[3] ***See Chambers***, ***supra*** at 40 ("[A] cash slip may be sufficient to establish that an appeal was delivered

[3] Appellant listed this Court's address as "Commonwealth Ave, Suite 1600" although the proper address is "601 Commonwealth Ave., Suite 1600." However, even with this deficiency, we believe that the address Appellant used was sufficiently clear to permit postal workers to ensure proper delivery.

to prison officials or deposited in the prison mailbox within the . . . filing period."). Thus, Appellant has provided sufficient proof that he filed his notice of appeal with this Court within the thirty-day appeal period. ***See Commonwealth v. Jones***, 700 A.2d 423, 426 (Pa. 1997) (holding that "we are inclined to accept any reasonably verifiable evidence of the date that the prisoner deposits the appeal with the prison authorities.").

Although the notice of appeal should have been filed in the PCRA court, upon its receipt the Superior Court clerk was required to forward it to the PCRA court for filing. ***See*** Pa.R.A.P. 905(a)(4) ("If a notice of appeal is mistakenly filed in an appellate court . . . the clerk shall immediately stamp it with the date of receipt and transmit it to the clerk of the court which entered the order appealed from, and . . . the notice of appeal shall be deemed filed . . . on the date originally filed."). Thus, under these circumstances, we conclude that Appellant has presented sufficient evidence that his notice of appeal was timely filed.

In his *pro se* brief, Appellant raises the following claims:

A. Whether PCRA court erred in not granting relief where a sentence is in violation of statute provisions pertaining to mandatory sentences[?]

B. Whether PCRA court erred for not upholding or recognizing the higher's court's decision to apply retroactive sentences when the higher court ruled on a constitutional matter, that effects [Appellant's] sentencing[?]

C. Whether PCRA court[] erred in not recognizing a structural error took place in relation to ***Alley***[***n***]***e***, that violates due process and triggers a double jeopardy violation[?]

Appellant's brief at 2.

Our standard of review is well-settled:

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court's decision on any grounds if the record supports it. Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa.Super. 2012) (citations omitted).

Additionally, under the PCRA, any PCRA petition "**including a second or subsequent petition**, shall be filed within one year of the date the judgment becomes final[.]" 42 Pa.C.S. § 9545(b)(1) (emphasis added). A judgment of sentence becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." ***Id.*** § 9545(b)(3). The PCRA's timeliness requirements are jurisdictional in nature, and a court may not address the merits of the issues raised if the PCRA petition was not timely filed. ***Commonwealth v. Albrecht***, 994 A.2d 1091, 1093 (Pa. 2010).

Here, Appellant's judgment of sentence became final on November 29, 2010, when the period of time in which to file an appeal with the United States Supreme Court expired.[4] ***See*** 42 Pa.C.S. § 9545(b)(3); ***see also Commonwealth v. Rojas***, 874 A.2d 638, 643 (Pa.Super. 2005). Appellant had until November 29, 2011, to timely file the instant PCRA petition, but did not do so until August 28, 2015. Thus, Appellant's petition is facially untimely under the PCRA.

Pennsylvania courts may consider an untimely PCRA petition if the appellant can explicitly plead and prove one of three exceptions set forth under 42 Pa.C.S. § 9545(b)(1). Any PCRA petition invoking one of these exceptions "shall be filed within 60 days of the date the claim could have been presented." ***Id***. § 9545(b)(2); ***see also Albrecht***, ***supra*** at 1094.

Here, Appellant has failed to plead or prove the applicability of any of the exceptions to the PCRA timeliness requirements. Instead, Appellant asserts that his claims raise a non-waivable challenge to the legality of his sentence on the basis that the trial court's application of the deadly weapon enhancement renders his sentence illegal under ***Alleyne v. United States***, 133 S. Ct. 2151 (2013).

While illegal sentencing claims are cognizable under the PCRA, ***see*** 42 Pa.C.S. § 9543(a)(2)(vii), a PCRA court is without jurisdiction to address such

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[4] Appellant had ninety days in which to file a timely petition for writ of *certiorari* with the United States Supreme Court. ***See*** U.S. Sup. Ct. R. 13.

claims unless the petition was timely filed or the petitioner is able to satisfy one of the timeliness exceptions. ***See Commonwealth v. Miller***, 102 A.3d 988, 995 (Pa.Super. 2014) (holding that a challenge to the legality of sentence may be lost if raised in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim); ***see also Commonwealth v. Jackson***, 30 A.3d 516, 523 (Pa.Super. 2011) (holding that "when the one-year filing deadline of section 9545 has expired, and no statutory exception has been pled or proven, a PCRA court cannot invoke inherent jurisdiction to correct orders, judgments and decrees, even if the error is patent and obvious.").

Here, Appellant's petition was untimely filed and he has failed to meet his burden to plead or prove the applicability of any of the exceptions to the PCRA timeliness requirements. Accordingly, we affirm the PCRA court's order dismissing it.[5]

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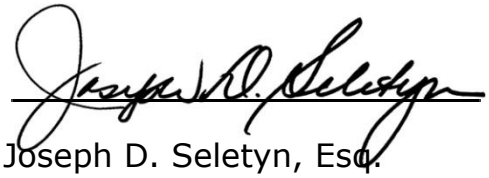
[5] We are further precluded from addressing Appellant's claims because he previously raised them in his *pro se* "*Habeas Corpus* Motion to Modify and Correct Illegal Sentence *Nunc Pro Tunc*" which was denied by the PCRA court on August 3, 2015. ***See*** 42 Pa.C.S. § 9543(a)(3) (providing that to be eligible for relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence "[t]hat the allegation of error has not been previously litigated or waived."); ***Id***. § 9544(a)(3) (providing that, under the PCRA, "an issue has been previously litigated if: . . . it has been raised and decided in a proceeding collaterally attacking the conviction or sentence."). We further observe that Appellant's reliance on ***Alleyne*** is misplaced, as Pennsylvania courts have held that the deadly weapon enhancement is merely advisory, rather than mandatory, and therefore does not implicate ***Alleyne***. ***See Commonwealth v. Shull***, 148 A.3d 820, 830 n.6 (Pa.Super. 2016).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/25/18