

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JEFFREY J. TILLMAN	:	
	:	
Appellant	:	No. 1465 EDA 2018

Appeal from the PCRA Order March 28, 2018
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0002478-2005

BEFORE: PANELLA, J., DUBOW, J., and NICHOLS, J.

MEMORANDUM BY PANELLA, J.:

FILED MAY 1, 2019

Jeffrey Tillman appeals, *pro se*, from the order dismissing his petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, as untimely. We quash the appeal.

In 2008, Tillman entered a *nolo contendere* plea to burglary and indecent assault. The trial court sentenced Tillman to two to ten years' incarceration for the burglary charge to be followed by two years' probation for the indecent assault charge. Tillman appealed. The court subsequently deemed the sentence for indecent assault to be illegal and vacated the sentence, while keeping the conviction for indecent assault intact¹.

¹ The court specifically found that although it was permissible for Tillman to plead guilty to both burglary and indecent assault, it was not permissible to

On May 4, 2010, Tillman filed his first *pro se* PCRA petition. Counsel was appointed and filed an amended PCRA petition, which was later withdrawn.

On April 9, 2015, Tillman filed a second *pro se* PCRA petition alleging the sentence imposed was illegal. The PCRA court gave notice of its intent to dismiss the petition as untimely without a hearing. The court granted Tillman's request for leave to amend his PCRA petition. His amended petition was later denied. Tillman appealed and this Court affirmed the dismissal of his second PCRA petition as untimely.

In September 2017², Tillman filed a third *pro se* PCRA petition. Counsel was appointed, but later filed a **Finley**³ "no-merit" letter and a motion to withdraw, stating Tillman was no longer eligible for relief under the PCRA because he had been discharged on January 8, 2018 and was no longer serving a sentence or under any supervision. The PCRA court permitted counsel to withdraw and issued its notice of intent to dismiss Tillman's petition.

On March 28, 2018, the PCRA court dismissed the petition. This appeal followed.

sentence him on both charges, where the indecent assault is the offense he intended to commit once he broke into the victim's garage. **See Commonwealth v. Tillman**, 475 EDA 2008 (Pa. Super., filed June 3, 2009) (unpublished memorandum).

² The official filing date is September 22, 2017. However, the court considered the Prison Mailbox Rule in accordance with Tillman's Praecipe filed on October 6, 2017 and thus determined the filing date to be September 15, 2017.

³ **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988)

Prior to reaching the merits of Tillman's claims on appeal, we must first consider the timeliness of his appeal. An untimely appeal divests this Court of jurisdiction to entertain the appeal. **See Commonwealth v. Edrington**, 780 A.2d 721, 725 (Pa. Super. 2001). We may address questions of our jurisdiction *sua sponte*. **See id.**

Tillman's notice of appeal was officially filed on May 3, 2018. The appeal was facially untimely, as he did not file it by April 28, 2018. **See** Pa.R.A.P. § 903(a). As a result, we ordered Tillman to show cause why the appeal should not be quashed. Tillman failed to file a response.

In his response to Appellee's brief⁴, Tillman claims his petition should be treated as having been filed on April 24, 2018, the date on which he mailed the notice *via* certified mail. Tillman seems to be following the prisoner mailbox rule, under which the timeliness of a filing from an incarcerated *pro se* party is measured from the date the prisoner places the filing in the institution's mailbox. **See Smith v. Pa. Bd. Of Prob. and Parole**, 683 A.2d 278, 281 (Pa. 1996). This rule applies to "all appeals from *pro se* prisoners[.]" **Commonwealth v. Jones**, 700 A.2d 423, 426 (Pa. 1997) (citation omitted).

However, Tillman was no longer a prisoner as of January 8, 2018. His appeal – filed over four months later – is not subject to the prisoner mailbox

⁴ Tillman seems to abandon his PCRA claim in his response, instead focusing on his outstanding *habeus corpus* petition. As even Tillman concedes, that petition is still pending in the trial court. **See** Reply Brief for Appellant, at 1.

rule. **See Smith**, at 281 (holding non-incarcerated appellants are able to file their appeal in person if worried about the efficiency of U.S. Postal Service). Thus, his appeal was untimely as it was filed more than thirty days after the PCRA court's notice of dismissal of his petition. **See** Pa.R.A.P. § 903(a).

Even if we were to address Tillman's untimely appeal, we would find the PCRA court's dismissal of Tillman's petition was proper as his claims were not cognizable under the PCRA at the time his petition was dismissed.

To be eligible for relief under the PCRA, a petitioner must be: (i) currently serving a sentence of imprisonment, probation or parole for the crime ..." 42 Pa.C.S. § 9543(a)(1). We have construed this provision to preclude PCRA relief where the petitioner is no longer serving a sentence for the crime at the time the PCRA court renders a decision.

Commonwealth v. Smith, 17 A.3d 873, 904 (Pa. 2011)(citation omitted).

Tillman was sentenced to two to ten years' imprisonment in 2009. He was discharged from prison in January 2018, three months before the PCRA court ruled on his PCRA petition. Accordingly, because Tillman was no longer serving a sentence at the time the PCRA court ruled on his petition, he is not entitled to relief on this claim. **See** 42 Pa.C.S. § 9543(a)(1); **See also Commonwealth v. Ahlborn**, 699 A.2d 718, 720 (Pa. 1997).

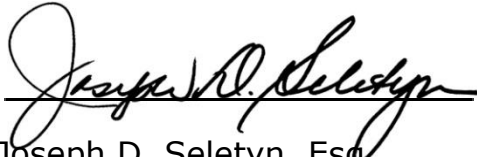
As Tillman is no longer entitled to relief under the PCRA, we would find the PCRA court properly dismissed the petition.

Nevertheless, as we lack jurisdiction over Tillman's untimely appeal, we are constrained to quash this appeal.

Appeal quashed. Jurisdiction relinquished.

J-S71009-18

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/1/19