NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
BRIAN KEITH DAVALOS,	:	
Appellant	:	No. 2275 EDA 2012

Appeal from the PCRA Order entered on August 8, 2012
in the Court of Common Pleas of Montgomery County,
Criminal Division, No. CP-46-CR-0007141-2005

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS and MUSMANNO, JJ.

MEMORANDUM MUSMANNO, J.: **FILED MAY 16, 2013**

Brian Keith Davalos ("Davalos"), *pro se*, appeals from the Order denying his second Petition for relief filed pursuant to the Post-Conviction Relief Act ("PCRA").[1] We affirm.

The PCRA court set forth the extended history of the instant appeal in its Opinion filed on September 7, 2012, which we adopt for the purpose of this appeal. ***See*** PCRA Court Opinion, 9/7/12, at 1-3. Of particular note, on May 18, 2012, Davalos filed a Petition for writ of *habeas corpus*. Treating Davalos's Petition as a petition for relief filed pursuant to the PCRA, on June 7, 2012, the PCRA court issued Notice of its intent to dismiss the Petition without a hearing. Specifically, the PCRA court concluded that Davalos's Petition was time-barred. Davalos filed a response to the Notice. On July

[1] 42 Pa.C.S.A. §§ 9541-9546.

10, 2012, the PCRA court entered an Order dismissing Davalos's PCRA Petition. Although Davalos purportedly filed an appeal of the dismissal of his PCRA Petition before entry of the PCRA court's final Order, we will overlook the procedural misstep, as a final Order now has been entered.

Davalos presents four claims for our review. However, before addressing these claims, we first must determine whether Davalos's PCRA Petition was timely filed.

An appellate court's standard of review regarding an order denying a PCRA petition is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Kretchmar***, 971 A.2d 1249, 1251 (Pa. Super. 2009). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Treadwell***, 911 A.2d 987, 989 (Pa. Super. 2006).

A PCRA petition must be filed within one year of the date the petitioner's judgment of sentence became final. 42 Pa.C.S.A. § 9545(b)(3). The one-year time limitation is jurisdictional and a trial court has no power to address the substantive merits of an untimely filed petition. ***Commonwealth v. Abu-Jamal***, 833 A.2d 719, 723-24 (Pa. 2003); ***Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000). The three exceptions to the one-year filing requirement are for newly discovered facts, interference by a government official, and a newly recognized

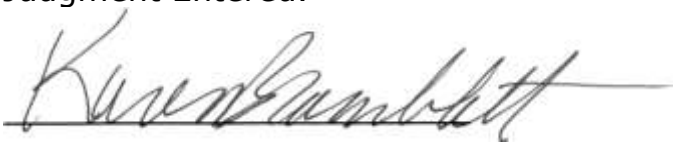
constitutional right. 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). The newly recognized constitutional right exception requires that "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States … after the time period provided in this section and has been held by the court to apply retroactively." ***Id.*** § 9545(b)(1)(iii).

In his appellate brief, Davalos asserts claims of ineffective assistance of prior counsel and argues that a *habeas corpus* court may "excuse a procedural default of an ineffective assistance claim." Brief for Appellant at 8. Davalos argues that his claim was not properly presented in state court, and contends that his counsel was ineffective for not challenging his arraignment and the sufficiency of the criminal information filed against him. ***Id.*** at 9-10. Davalos also generically asserts that the Commonwealth failed to provide exculpatory evidence to him. ***Id.*** at 11. However, Davalos fails to present any argument establishing an exception to the PCRA's timeliness requirement.

Our review of the record discloses that in its Opinion, the PCRA court discussed the PCRA's timeliness requirement and correctly determined that Davalos's Petition was not timely filed. PCRA Court Opinion, 9/7/12, at 6-7. We therefore affirm on the basis of the PCRA court's Opinion with regard to the claims raised by Davalos. ***See id.***

Order affirmed.

Judgment Entered.



Prothonotary

Date: 5/16/2013

SC8041-13

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. 7141-05

V.

BRIAN KEITH DAVALOS

OPINION

NICHOLAS, S.J. September 4th, 2012

Defendant, Brian Keith Davalos, has filed a notice of appeal to the Superior Court of Pennsylvania from an order purportedly entered by this court on August 8, 2012. This court, however, entered no order in the above-captioned case on August 8, 2012. We believe it is actually defendant's intention to appeal from our order dated July 10, 2012, which dismissed defendant's second PCRA petition – styled as a petition for writ of *habeas corpus* – without a hearing. We further believe that defendant's appeal is without merit and should be denied.

Background and Discussion

On August 16, 2006, following a jury trial before the undersigned, defendant was convicted of rape[1], involuntary deviate sexual intercourse[2], aggravated assault[3], and related offenses. A full discussion of the facts of this case may be found in our opinion dated October 22, 2007, addressing the issues raised by defendant on direct appeal. Stated succinctly, defendant

[1] 18 Pa.C.S. §3121
[2] 18 Pa.C.S. §3123
[3] 18 Pa.C.S. §2702

gained entry to his estranged wife's residence on a pretext, following which he: forced his wife to undress and perform oral sex on him; restrained her with handcuffs; raped and sodomized her; and violated her anally with a hammer (N.T., August 15, 2006, pp. 104-141).

On May 2, 2007, following hearing, the undersigned adjudged defendant – who had a prior conviction for involuntary deviate sexual intercourse – to be a sexually violent predator. That same date, the undersigned imposed an aggregate sentence of not less than twenty (20) nor more than forty (40) years imprisonment on defendant's convictions.

Defendant failed to perfect a timely direct appeal. By order dated August 2, 2007, the undersigned reinstated defendant's right to file post-sentence motions and a direct appeal, *nunc pro tunc*, pursuant to an agreement between the Commonwealth and defendant's newly-appointed attorney: Henry S. Hilles, III, Esquire. Mr. Hilles subsequently filed a post-sentence motion on defendant's behalf, contending that defendant's sentence was unduly severe. The undersigned denied this motion by order dated August 14, 2007.

On September 12, 2007, Mr. Hilles filed on defendant's behalf a direct appeal to the Superior Court of Pennsylvania. By memorandum opinion dated April 11, 2008, the Superior Court affirmed the judgment of sentence (2325 EDA 2007). Defendant did not file a petition for allowance of appeal in the Supreme Court of Pennsylvania.

On June 24, 2008, Mr. Hilles filed on defendant's behalf a timely petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §9541, *et seq.*, raising claims of ineffective assistance on the part of defendant's trial attorney – Edward J. Rideout, III, Esquire. A hearing on defendant's petition was held before the undersigned on October 29, 2008. Following hearing, the undersigned determined that defendant was not entitled to PCRA relief and,

accordingly, denied defendant's petition by order dated December 5, 2008. Defendant appealed to the Superior Court, which denied defendant's appeal by memorandum opinion dated February 22, 2011 (466 EDA 2009). Defendant did not file a timely petition for allowance of appeal in the Supreme Court of Pennsylvania. By order dated October 27, 2011 (80 MM 2011), the Supreme Court denied defendant's subsequent petition for leave to file a petition for allowance of appeal, *nunc pro tunc*..

On May 18, 2012, defendant filed in this court, *pro se*, the instant "Petition for Writ of *Habeas Corpus*." Said petition – which is at points incomprehensible – consists largely of boilerplate statements of principles of law. To the extent that defendant's petition advances any specific claim related to his case, it appears to be that his sentence was so severe as to be constitutionally infirm and illegal.

Although styled as a petition for writ of *habeas corpus*, it is clear that defendant's filing had to be treated by this court as a PCRA petition. It is well-settled that post-conviction filings which raise claims that are cognizable under the Post Conviction Relief Act *must* be treated as PCRA petitions, regardless of how the defendant labels his filing. See, e.g., *Commonwealth v. Kutnyak,* 781 A.2d 1259 (Pa. Super. 2001). See also, *Commonwealth v. Bronshtein,* 561 Pa. 611, 752 A.2d 868 (2000). Clearly, a claim of illegal sentence is a claim that is cognizable under the Act.

As a PCRA petition, defendant's petition is thus subject to the time requirements of the Post Conviction Relief Act, which requires that all PCRA petitions – including second and subsequent petitions – must be filed within one year of the date the petitioner's judgment of sentence becomes final. On June 7, 2012 – for reasons that will be explained in detail below – this court notified defendant, pursuant to Pa.R.Crim.P. 907(1), of our intention to dismiss defendant's second PCRA petition as time-barred.

In our Rule 907(1) Notice we advised defendant of his right to respond to the proposed dismissal of his petition within twenty (20) days. On June 28, 2012, we received a copy of what we took to be defendant's response to our Rule 907(1) Notice. Said filing consists of 32 pages under various captions, including: "Notice Petition to Pa.R.Crim.P. 907(1)"; "Petition to Pa.R.Crim.P. 907(1)"; "Application for Relief Merit Argument"; and "Requestion (sic) For Allowance Permission to Pa.R.Crim.P. 907(1) and Appeal the Judgment of Sentence."

Defendant's June 28, 2012 filing – which is frankly incomprehensible in parts – failed to raise any genuine issue of fact as to whether defendant's second PCRA petition had been timely filed, and failed to establish any entitlement to PCRA relief. Accordingly, on July 10, 2012, we entered this court's final order, dismissing defendant's second PCRA petition. In pertinent part, our final order stated:

> "1. To the extent that defendant's filing is intended to respond to the Court's Rule 907(1) notice, said filing fails to establish defendant's entitlement to PCRA relief or to raise any issue requiring a hearing.
>
> 2. To the extent that defendant's filing is intended to present a new PCRA petition, it is premature, and is thus **DISMISSED**, given that it was filed while review of the instant PCRA petition remained pending. Said filing, again, is without merit on its face given that it in any event raises no issue entitling defendant to PCRA relief. We note that defendant's apparent assertion that his June 28, 2012 filing constitutes a *first* PCRA petition is completely incorrect. Defendant's *first* PCRA petition was denied by the undersigned on December 5, 2008. Defendant's *second* PCRA petition is dismissed by this order.
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> 3. To the extent that defendant's June 28, 2012 filing requests reinstatement of his right to file a direct appeal, said request is utterly without merit and is **DENIED**. Defendant contends that he "has had no direct appeal." The record reflects on its face: a) that defendant's direct appeal rights were reinstated, *nunc pro tunc,* by order dated August 2, 2007; b) that defendant then filed a direct appeal; and c) that

defendant's direct appeal was denied by the Superior Court of Pennsylvania by memorandum opinion dated April 11, 2008 (2325 EDA 2007."

On August 2, 2012, the undersigned received a docketing statement (2042 EDA 2012) from the Superior Court of Pennsylvania indicating that defendant's June 28, 2012 filing had been interpreted by the Montgomery County Clerk of Courts as a notice of appeal from our June 7, 2012 Rule 907(1) Notice, and had been forwarded as such to the Superior Court. Prior to receiving the Superior Court docketing statement, the undersigned had no knowledge that defendant's June 28, 2012 filing had been treated as a notice of appeal.

On August 10, 2012, the undersigned entered an opinion pursuant to Pa.R.A.P. 1920(a) in the appeal docketed at 2042 EDA 2012. In our opinion, we asked that the "appeal" filed on June 28, 2012 be quashed, on the basis that we did not believe it was defendant's intention that the June 28, 2012 filing be treated as a notice of appeal and because, in any event, an appeal filed on June 28, 2012 would have been premature, given that this court had not at that time entered a final order determining defendant's second PCRA petition. To date, the "appeal" docketed at 2042 EDA 2012 remains pending in the Superior Court.

On August 22, 2012, the undersigned received a copy of the instant notice of appeal. This notice of appeal is dated August 8, 2012, and apparently was filed by defendant directly in the Superior Court of Pennsylvania on August 13, 2012. The notice of appeal was subsequently entered on the docket in the Montgomery County Court of Common Pleas on August 16, 2012, and purports to be an appeal from an order entered by this court on August 8, 2012 (i.e., the very same day on which the notice of appeal itself apparently was drafted).

As stated above, this court entered no order in this case on August 8, 2012, and we believe it was defendant's actual intention in his August 8, 2012 notice of appeal to appeal from our July 10, 2012 final order dismissing his second PCRA petition. If that is indeed defendant's intention, we believe that said appeal is without merit, for all of the reasons stated in our June 7, 2012 Notice Pursuant to Pa.R.Crim.P. 907(1). As we informed defendant:

Pursuant to 42 Pa.C.S.A. §9545(b)(1), all PCRA petitions – including second and subsequent petitions – normally must be filed within one year from the date the petitioner's judgment of sentence became final. It is well-settled that this time limitation is mandatory and jurisdictional, that no court may ignore or alter the time limitation, and that courts simply are without authority to grant relief on the basis of untimely PCRA petitions. See, *Commonwealth v. Albrecht,* 994 A.2d 1091 (Pa. 2010), *Commonwealth v. McKeever,* 947 A.2d 782, 784-785 (Pa. Super. 2008).

In the instant case, as noted above, the Superior Court denied defendant's direct appeal on April 11, 2008. Defendant did not seek discretionary review in the Supreme Court of Pennsylvania. Defendant's judgment of sentence thus became final for PCRA purposes on May 12, 2008. See, 42 Pa.C.S.A. §9545(b)(3). Defendant had one year from that date in which to file a timely PCRA petition. Defendant's first PCRA petition – filed June 24, 2008 – was timely. The instant petition – dated May 15, 2012, and docketed on May 18, 2012 – is untimely on its face.

In order to be considered on its merits, any PCRA petition which is filed *after* the expiration of the one-year filing period provided by the Act *must* plead and establish the applicability of one of the three statutory exceptions to §9545(b)(1), which are enumerated at §9545(b)(1)(i-iii). Further, pursuant to 42 Pa.C.S.A. §9545(b)(2), any petition invoking one of the three exceptions

must be filed "within 60 days of the date the claim could have been presented."

Defendant here has failed to plead the applicability of any of the statutory exceptions to the Act's time requirements, but has instead characterized his petition as a petition for writ of *habeas corpus* in an apparent attempt to evade the time restrictions of the Post Conviction Relief Act. As discussed above, given that the petition raises claims that are cognizable under the Act, the petition must be treated as a PCRA petition and remains subject to the Act's time restraints. Defendant's failure to establish the applicability of any of the exceptions to the Act's time requirements is fatal to his petition. See, *Commonwealth v. Derrickson,* 900 A.2d 407 (Pa. Super. 2006). In any event, our review of the record indicates that none of the exceptions apply. Defendant's petition is accordingly time-barred, and this court is without jurisdiction to consider it on its merits.

We note for the record that, even *were* we authorized to rule upon the merits of defendant's claims, we would nonetheless have dismissed defendant's petition, given that said petition fails to establish a *prima facie* case that a miscarriage of justice may have occurred, a requirement for any second or subsequent PCRA petition. See, *Commonwealth v. Stokes,* 598 Pa. 574, 959 A.2d 306 (2008).

BY THE COURT:

WILLIAM T. NICHOLAS, S.J.