NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHAEL DAVID HUBBARD Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2611 EDA 2012

Appeal from the PCRA Order August 17, 2012
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-51-CR-0004494-1999

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J. Filed: March 1, 2013

Michael David Hubbard appeals from the order of the Court of Common Pleas of Chester County dismissing as untimely his serial petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46. Upon review, we affirm.

On May 31, 2000, following a jury trial, Hubbard was convicted of robbery,[1] kidnapping[2] and terroristic threats.[3] On December 21, 2000, Hubbard was sentenced to consecutive terms of 10 to 20 years' imprisonment on the robbery and kidnapping convictions. Hubbard appealed

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[1] 18 Pa.C.S.A. § 3701(a)(1)(ii).

[2] 18 Pa.C.S.A. § 2901(a)(3).

[3] 18 Pa.C.S.A. § 2706.

his judgment of sentence to this Court, which, by memorandum decision dated February 27, 2002, affirmed. Our Supreme Court denied Hubbard's petition for allowance of appeal on September 24, 2002.

On February 3, 2003, Hubbard timely filed his first *pro se* PCRA petition. Counsel was appointed and, on March 29, 2004, filed an amended petition. The PCRA court held an evidentiary hearing on June 3, 2004; by order dated June 30, 2004, Hubbard's petition was dismissed. This Court affirmed the order of the PCRA court on May 19, 2005 and, on December 14, 2005, the Supreme Court denied Hubbard's petition for allowance of appeal.

Hubbard filed his second PCRA petition on May 19, 2009, in which he asserted the existence of newly-discovered exculpatory evidence in the form of a theretofore unknown witness. Pursuant to Pa.R.Crim.P. 904(D) and (E)[4], the PCRA court appointed counsel, who filed an amended petition on September 28, 2009. The Commonwealth filed an answer on November 9, 2009 and, one month later, the PCRA court held an evidentiary hearing at

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[4] Pennsylvania Rule of Criminal Procedure 904(D) provides that:

> [o]n a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 908, the judge shall appoint counsel to represent the defendant.

Rule 904(E) requires the court to appoint counsel "whenever the interests of justice require it."

which Hubbard and the newly-discovered witness both testified. Finding the testimony of the new witness to be lacking in credibility, the PCRA court dismissed Hubbard's petition on March 12, 2010. That order was affirmed by this Court on October 22, 2010, and our Supreme Court denied allowance of appeal on January 24, 2011.

On June 28, 2012, Hubbard filed the instant, *pro se* PCRA petition, his third, in which he alleged ineffective assistance of counsel. In support of his claim, he cited to the U.S. Supreme Court's decision in ***Martinez v. Ryan***, ___ U.S. ___, 132 S.Ct. 1309 (2012), in which the Court held that:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320. Hubbard asserted that the Court's decision in ***Martinez*** 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 that court to apply retroactively" pursuant to 42 Pa.C.S.A. § 9545(b)(1)(iii), and that he asserted the right within sixty days as required under section 9545(b)(2).

The PCRA court found ***Martinez*** afforded Hubbard no relief, concluded that the petition was untimely and denied relief without a hearing by order

dated August 17, 2012. Hubbard filed his notice of appeal to this Court on August 31, 2012.

This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. ***Commonwealth v. Burkett***, 5 A.3d 1260, 1267 (Pa. Super. 2010) (citations omitted). In evaluating a PCRA court's decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level. ***Id.***

Generally, a petition for PCRA relief, including a second or subsequent petition, must be filed within one year of the date the judgment is final. ***See*** 42 Pa.C.S.A. § 9545(b)(3); ***see also Commonwealth v. Alcorn***, 703 A.2d 1054 (Pa. Super. 1997). There are, however, three exceptions to the time requirement, set forth at section 9545(b)(1) of the PCRA. Where the petition alleges, and the petitioner proves, that an exception to the time for filing the petition is met, the petition will be considered timely. These exceptions include interference by government officials in the presentation of the claim, after-discovered facts or evidence, and an after-recognized constitutional right. 42 Pa.C.S.A. § 9545(b)(1); ***Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000). A PCRA petition invoking one of these exceptions must be filed within 60 days of the date the claims could have been presented. 42 Pa.C.S.A. § 9545(b)(2). The timeliness

requirements of the PCRA are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely petitions. ***Commonwealth v. Robinson***, 837 A.2d 1157 (Pa. 2003).

Here, Hubbard's judgment of sentence became final on December 23, 2002, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal, when the time for seeking discretionary review in the United States Supreme Court expired. ***See*** 42 Pa.C.S.A. § 9545(b)(3); U.S. Sup. Ct. Rule 13. Thereafter, Hubbard had one year, or until December 23, 2003, in which to file a PCRA petition. Hubbard filed the instant petition on June 28, 2012, approximately 9½ years after his judgment of sentence became final. As such, his petition is untimely unless he pleads and proves one of the exceptions to the time bar under section 9545(b).

In his instant PCRA petition, Hubbard alleged several instances of ineffectiveness of appellate counsel and prior PCRA counsel. In order to overcome the one-year jurisdictional time bar, Hubbard asserted that the U.S. Supreme Court's ***Martinez*** decision recognized a new constitutional right that "defendants should have their claims of Sixth amendment [sic] violations presented by effective PCRA counsel during this proceedings [sic] because this failure will waive any potential claims that could have been presented in the first petition." PCRA Petition, 6/28/12, at 4-5.

In ***Martinez***, an Arizona defendant was convicted of two counts of sexual conduct with a minor. On direct appeal, Martinez, through counsel,

raised issues of sufficiency of the evidence and newly discovered evidence. However, because Arizona, like Pennsylvania, requires that issues of ineffectiveness of counsel be reserved for state collateral proceedings, no issues of ineffectiveness were raised.

While Martinez's direct appeal was pending, counsel filed post-conviction collateral proceedings.[5] However, counsel raised no claims of trial counsel's ineffectiveness, instead asserting that she could discern no colorable claims at all. The post-conviction court granted Martinez 45 days to file a *pro se* petition to raise those claims he believed had merit; however, counsel failed to advise Martinez of his need to do so in order to preserve his claims. The post-conviction court subsequently dismissed the petition.

Thereafter, Martinez filed a second, counseled petition for post-conviction relief, asserting the ineffectiveness of trial counsel. The court dismissed the petition, finding that Martinez should have raised his ineffectiveness claims in his first post-conviction petition. Both the state court of appeals and supreme court affirmed.

Martinez then filed a *habeas corpus* petition in the U.S. District Court for the District of Arizona, again raising his claims of ineffectiveness. In his *habeas* petition,

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[5] Pursuant to Ariz.R.Crim.P. 32.4, it is procedurally acceptable to institute post-conviction collateral proceedings while a direct appeal is pending.

> Martinez acknowledged the state courts denied his claims by relying on a well-established state procedural rule, which, under the doctrine of procedural default,[6] would prohibit a federal court from reaching the merits of the claims. [However, he] could overcome this hurdle to federal review, Martinez argued, because he had cause for the default: His first postconviction counsel was ineffective in failing to raise any claims in the first notice of postconviction relief and in failing to notify Martinez of her actions.

Martinez, 132 S.Ct. at 1314-15 (internal citation omitted). The district court denied Martinez's petition, ruling that "Arizona's preclusion rule was an adequate and independent state-law ground to bar federal review." ***Id.*** at 1315.

After the Court of Appeals for the Ninth Circuit affirmed, the U.S. Supreme Court granted *certiorari* to determine "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding."[7] ***Id.*** The Court concluded that such ineffective assistance may establish cause, because an initial-review collateral

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[6] Under the doctrine of "procedural default," a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule. ***Martinez***, 132 S.Ct. at 1316. Such a default may, in some circumstances, be excused where cause can be shown. ***Id.***

[7] The Court defined "initial-review collateral proceeding" as collateral proceedings which provide the first occasion to raise a claim of ineffectiveness at trial. ***Martinez***, 132 S.Ct. at 1315.

proceeding "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." ***Id.*** at 1317. However, the Court specifically did not decide the case on constitutional grounds. ***See id.*** at 1315 ("This is not the case, however, to resolve whether that exception exists as a constitutional matter."). Rather, the Court ruled on equitable grounds, explaining:

> A constitutional ruling would provide defendants a free-standing constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from the state courts if the States' system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceeding. In addition, state collateral cases on direct review from state courts are unaffected by the ruling in this case.

Id. at 1319-20.

Here, Hubbard's asserted ground for excusing his failure to comply with the PCRA time bar is "the assertion of a constitutional right recognized by the United States Supreme Court . . . after the time period provided by this section has been expired, and has been held to apply retroactively by that same court." 42 Pa.C.S.A. § 9545(b)(1)(iii). However, because the U.S. Supreme Court explicitly stated that ***Martinez*** was **not** decided on constitutional grounds, Hubbard has failed to satisfy the exception.

Moreover, the Court did not hold that its ruling applied retroactively. Finally, the decision in ***Martinez*** was issued on March 20, 2012. Section 9545(b)(2) requires that any claim alleging an exception to the time bar must be filed within 60 days of the date the claims could have been presented; here, that would have required Hubbard to file his petition no later than May 21, 2012.[8] Hubbard actually filed his petition on June 28, 2012.

In any event, "[w]hile Martinez represents a significant development in federal *habeas corpus* law, it is of no moment with respect to the way Pennsylvania courts apply the plain language of the time bar set forth in section 9545(b)(1) of the PCRA." ***Commonwealth v. Saunders***, 2013 PA Super 9, at *7 (Pa. Super. 2013).

For the foregoing reasons, the PCRA Court properly dismissed Hubbard's petition as untimely.

Order affirmed.

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[8] Hubbard claims that the sixty-day period under section 9545(b)(2) be deemed to have begun to run on April 28, 2012, "when the Supreme Court reporter arrived in the state correctional institution at Rockview[.]" This assertion is false. We have previously held that "the sixty-day period begins to run upon the date of the underlying judicial decision." ***Commonwealth v. Boyd***, 923 A.2d 513, 517 (Pa. Super. 2007). Ignorance of the law would not have excused Hubbard's failure to file his petition within the 60 days following the issuance of the ***Martinez*** decision, even if it were helpful to his case. ***Commonwealth v. Baldwin***, 789 A.2d 728 (Pa. Super. 2001). Neither the court system nor the correctional system is obliged to educate or update prisoners concerning changes in case law. ***Id.***