

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ELLIS LEE

Appellant

No. 3367 EDA 2012

Appeal from the PCRA Order November 8, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0003033-1980

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED DECEMBER 06, 2013

Appellant, Ellis Lee, appeals *pro se* from the November 8, 2012 order dismissing his sixth petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The PCRA court summarized the relevant factual and procedural history of this case as follows.

On December 23, 1979, [Appellant] was arrested for robbery of bingo proceeds from Saint Michael's Church in Chester, Delaware County and the murder of the man who was taking them to the rectory.

* Former Justice specially assigned to the Superior Court.

On July 25, 1980, a jury convicted [Appellant] for his role in the robbery and murder.

[Appellant] asked for a new trial on the ground that a co-defendant had recanted his trial testimony. On February 17, 1981, in a hearing before the trial court, the co-defendant affirmed the truthfulness of his trial testimony. The trial judge denied [Appellant]'s motion for a new trial.

[Appellant] filed a direct appeal to the Superior Court, which affirmed the convictions on September 23, 1983.

On July 18, 1986, [Appellant] filed his first collateral relief petition under the Post-Conviction Hearing Act (PCHA), alleging that the Commonwealth had used perjured testimony to secure his conviction and that it had entered into an undisclosed prosecution deal with his co-defendant. The trial judge conducted a hearing on March 4, 1987 and, in an order and opinion issued on January 6, 1988, denied the petition.

On February 5, 1988, [Appellant] filed an appeal to the Superior Court, which dismissed it for failure to file a brief.

On May 6, 1994, [Appellant] filed a second post-conviction collateral relief petition under the Post-Conviction Relief Act (PCRA). On June 7, 1994, the trial judge denied the petition on the ground that the issues had been previously litigated.

On October 13, 1994, [Appellant] filed his third post-conviction relief petition. On March 21, 1997, after a full hearing, the trial judge issued specific findings of fact and denied the petition. [Appellant] filed a late appeal to the Superior Court, which quashed it as untimely. On January 15, 1998, [Appellant] filed a motion in the Court of Common Pleas requesting that he be permitted to file an appeal *nunc pro tunc*. On March 12, 1998, the trial judge denied the motion. [Appellant] filed a Petition

for Allowance of Appeal with the Pennsylvania Supreme Court, which denied it in an order dated June 4, 1998.

On September 23, 1998, [Appellant] filed a federal habeas corpus petition. On May 21, 1999, Federal Magistrate Judge Peter Scuderi recommended that the petition be denied. On June 1, 1999, a federal District Court Judge adopted the recommendations of the Magistrate Judge and dismissed the petition. [Appellant] did not pursue any appeals in the federal courts.

On February 10, 2003, [Appellant] filed a fourth post-conviction collateral relief petition. On September 30, 2003, the PCRA court dismissed the fourth petition as untimely filed. The same court then issued a series of opinions. On November 1, 2004, the Superior Court affirmed the dismissal of the fourth post-conviction petition as untimely filed.

In May 2006, [Appellant] filed another *pro se* post-conviction pleading, which he captioned as a "motion to open and vacate order/sentence." On June 27, 2006, the PCRA court issued a Notice of Intent to Dismiss with Prejudice the motion, which it characterized as a fifth PCRA petition. On October 26, 2007, the PCRA court issued an order dismissing the fifth PCRA petition without an evidentiary hearing. On November 7, 2008, the Superior Court affirmed the dismissal of this fifth petition.

While the fifth petition was pending, [Appellant] sought relief in the Pennsylvania Supreme Court, requesting "Mandamus or Extraordinary Relief or King's Bench Relief." On July 8, 2008, the Pennsylvania Supreme Court denied the motion.

PCRA Opinion, 4/15/13, at 1-3.

On May 7, 2012, Appellant filed the instant *pro se* PCRA petition, his sixth, asserting that the United States Supreme Court's decisions in **Maples**

v. Thomas, 132 S. Ct. 912 (2012) and **Martinez v. Ryan**, 132 S. Ct. 1309 (2012), allow reinstatement of his PCRA petition. Thereafter, on June 18, 2012, the Commonwealth filed its response. On June 28, 2012, the PCRA Court issued its notice of intent to dismiss Appellant's petition without a hearing pursuant to Pa.R.Crim.P. 907. On November 9, 2012, the PCRA court dismissed Appellant's PCRA petition.¹ On December 3, 2012, Appellant filed a *pro se* notice of appeal.

On January 14, 2013, the PCRA court directed Appellant to file a concise statement of errors complained of on appeal, within 21 days of said order, in accordance with Pa.R.A.P. 1925(b). Appellant did not file said statement until February 14, 2013. On April 15, 2013, the PCRA court filed its Rule 1925(a) opinion.

On appeal, Appellant raises the following issues for our review.

- [1.] Did the post-conviction court err as a matter of law in finding the PCRA petition untimely filed, when the [PCRA] court failed to apply the doctrine of the United States Supreme Court's law that makes "new case-law retroactive" if two or more cases on the same issue have been ruled upon by the United States Supreme Court[?]
- [2.] Does the record reveal that [] Appellant received ineffective assistance of initial post-conviction counsel, under the sixth and fourteenth amendments of the United States

¹ On July 18, 2012 Appellant filed a premature notice of appeal with this Court, which was dismissed on September 6, 2012.

Constitution? If not did the post-conviction court err by not holding an evidentiary hearing to develop [sic] the record under the United States Supreme Court's new case-law on a substantive claim of ineffective assistance of initial post-conviction counsel[?]

Appellant's Brief at vi.

We begin by noting our well-settled standard of review. "On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted). "[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 PCRA court level." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." ***Commonwealth v. Spatz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). "However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

Prior to addressing the merits of Appellant's claims, we must first determine whether Appellant has complied with Pennsylvania Rule of Appellate Procedure 1925(b) to preserve these claims for our review. Rule 1925(b) requires that statements "identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa.R.A.P. 1925(b)(4)(ii). The Rule also requires that

“[e]ach error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court” **Id.** at 1925(b)(4)(v). Finally, any issues not raised in accordance with Rule 1925(b)(4) will be deemed waived. **Id.** at 1925(b)(4)(vii). Our Supreme Court has held that Rule 1925(b) is a bright-line rule.

Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule’s terms; the Rule’s provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule’s requirements; Rule 1925 violations may be raised by the appellate court *sua sponte*, and the Rule applies notwithstanding an appellee’s request not to enforce it; and, if Rule 1925 is not clear as to what is required of an appellant, on-the-record actions taken by the appellant aimed at compliance may satisfy the Rule. We yet again repeat the principle first stated in [**Commonwealth v. Lord**, 719 A.2d 306 (Pa. 1998)] that must be applied here: “[I]n order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925. Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived.” [**Id.**] at 309.

Commonwealth v. Hill, 16 A.3d 484, 494 (Pa. 2011) (footnote omitted).

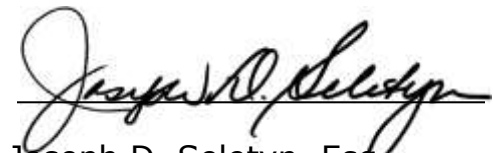
In the case *sub judice*, the PCRA court directed Appellant to file a Rule 1925(b) statement on January 14, 2013. The order directed Appellant to file said statement within 21 days of said order, which was February 4, 2013.

However, Appellant's *pro se* Rule 1925(b) statement was not filed until February 14, 2013, 10 days after the filing period had expired. As a result, following our Supreme Court's directive in **Hill**, we are required to deem all of Appellant's issues waived.² **See Hill, supra.**

Based on the foregoing, we conclude that Appellant has waived all of his issues on appeal for failure to timely file his Rule 1925(b) statement.³ Accordingly, the PCRA court's November 8, 2012 order is affirmed.

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/6/2013

² Even if we were to reach the merits of whether Appellant's PCRA petition pleads an exception to the PCRA time-bar, we conclude Appellant has failed to plead a recognized exception. **See** 42 Pa.C.S. § 9545. In **Commonwealth v. Saunders**, 60 A.3d 162 (Pa. Super. 2013), this Court held that **Martinez** does not create an exception to the PCRA's time-bar. "While **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." **Id.** at 165.

³ Although the PCRA court dismissed Appellant's PCRA petition on the merits, we may affirm the PCRA court on any basis supported by the record. **Commonwealth v. Wiley**, 966 A.2d 1153, 1157 (Pa. Super. 2009) (citation omitted).