

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MICHAEL EDWARD SILUK, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 345 MDA 2012

Appeal from the Order Entered January 11, 2012
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0004194-2001
CP-22-CR-0004196-2001
CP-22-CR-0004197-2001
CP-22-CR-0004198-2001
CP-22-CR-0004199-2001

BEFORE: MUNDY, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.:

Filed: January 3, 2013

Appellant, Michael Edward Siluk, appeals *pro se* from the January 11, 2012 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we quash the appeal.

The relevant facts and procedural history, as gleaned from the certified record, are as follows. In September 2001, Appellant was arrested and charged with the rape and sexual assault of several prostitutes in Harrisburg, Pennsylvania. Appellant proceeded to a jury trial on November

* Retired Senior Judge assigned to the Superior Court.

4, 2002. Following a four-day trial, Appellant was found guilty of four counts of rape, two counts each of aggravated indecent assault, aggravated assault, and robbery, and one count each of involuntary deviate sexual intercourse, sexual assault, and simple assault.¹ Thereafter, on February 20, 2003, the trial court imposed an aggregate sentence of 621 months to 1260 months' imprisonment. On January 15, 2004, this Court affirmed Appellant's judgment of sentence, and on November 5, 2004, our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Siluk***, 847 A.2d 761 (Pa. Super. 2004) (unpublished memorandum), *appeal denied*, 860 A.2d 123 (Pa. 2004).

Thereafter, on October 12, 2005, Appellant filed a timely PCRA petition, his first. Subsequently, Appellant's PCRA counsel withdrew from representation pursuant to ***Turner/Finley***,² and on January 30, 2006, the PCRA court dismissed the petition. Thereafter, this Court affirmed the dismissal on March 6, 2007. ***Commonwealth v. Siluk***, 927 A.2d 658 (Pa. Super. 2007) (unpublished memorandum). Appellant did not seek leave to appeal from our Supreme Court. Additionally, Appellant filed multiple requests for post-conviction relief in December 2005, January 2006, April

¹ 18 Pa.C.S.A. §§ 3121, 3125, 2702, 3701, 3123, 3124.1, and 2701, respectively.

² ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

2007, May 2008, and March 2010. All petitions for post-conviction relief were denied by the trial court, and where appeals were lodged, the orders of the trial court were affirmed by this Court. *See Commonwealth v. Siluk*, 22 A.3d 1083 (Pa. Super. 2010); *Commonwealth v. Siluk*, 981 A.2d 934 (Pa. Super. 2009).

On December 22, 2011, Appellant filed the instant petition to correct and/or modify his alleged illegal sentence. On January 11, 2012, the trial court denied said petition on its merit. Appellant filed a notice of appeal with this Court on February 15, 2012.³

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

1. Whether the [PCRA] court erred in denying Appellant's petition, where Appellant's flat sentences of ten years in the cases at 4194, 4196, and 4198CR2001, are illegal pursuant to 42 Pa.C.S.A. § 9756(b), and where these crimes run concurrent with a felony one charge which Appellant received a minimum mandatory (10) to (20) year sentence for which [sic] satisfied the requirements of 42 Pa.C.S. § 9714?
2. Whether the [trial] court has the authority to authorize and allow the Department of Corrections to change the flat ten year sentences for felony two crimes to ten to twenty year sentences almost a year after the sentences were imposed?

Appellant's Brief at 3.

³ Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Initially, we must address two procedural issues – the timeliness of Appellant’s motion to modify sentence, and the timeliness of Appellant’s appeal from the trial court order denying said motion. These threshold issues implicate the jurisdiction of this Court, which is a matter that may be raised *sua sponte*. ***Commonwealth v. Patterson***, 940 A.2d 493, 497 (Pa. Super. 2007), *appeal denied*, 960 A.2d 838 (Pa 2008).

We first note that Appellant filed the instant petition for sentence modification over eight years after his sentence was imposed. As such, his sentencing claims would normally be waived. **See** Pa.Crim.P 720(A)(1) (“a written post-sentence motion shall be filed no later than 10 days after imposition of sentence”).⁴ However, it is well-settled that challenges to the legality of sentence cannot be waived and are cognizable under the PCRA. ***Commonwealth v. Jackson***, 30 A.3d 516, 521 (Pa. Super. 2011). Accordingly, we shall treat Appellant’s untimely motion to modify sentence, which challenges the legality of his sentence, as a PCRA petition for the purposes of our appellate review.

We must next consider whether this appeal was timely filed in relation to the January 11, 2012 order denying Appellant’s motion to modify his sentence. **See *Commonwealth v. Hockenberry***, 689 A.2d 283, 288 (Pa. Super. 1997). Pursuant to Pennsylvania Rule of Appellate Procedure 903(a),

⁴ The record reveals that Appellant was informed of this time limitation at the time of sentencing. N.T., 2/20/03, at 26-27.

“notice of appeal...shall be filed within 30 days after the entry of the order from which the appeal is taken.” Pa.R.A.P. 903(a). Additionally, under the prisoner mailbox rule, an appeal by a *pro se* prisoner is deemed filed on the date the prisoner deposits the appeal with prison authorities or places it in a prison mailbox, though the appeal is actually received after the deadline for filing an appeal. ***Commonwealth v. Jones***, 700 A.2d 423, 426 (Pa. 1997). In determining the filing date of such appeals, we are inclined to accept any reasonably verifiable evidence of the date the appeal was deposited with prison authorities, including a certificate of mailing, cash slip from prison authorities, affidavit from the prisoner, or evidence of internal operating procedures of the prison or trial court regarding mail delivery. ***Id.***

In the instant case, Appellant’s notice of appeal was received by the Dauphin County Clerk of Courts on February 15, 2012, which is 35 days after the entry of the January 11, 2012 order. Furthermore, a review of the record reveals that the notice of appeal bearing Appellant’s signature is itself dated February 11, 2012, which is 31 days after the entry of the order. We conclude that the prisoner mailbox rule is of no avail to Appellant because the earliest date on which he could have deposited the notice with prison officials, the date of execution of the notice, is beyond the 30-day time period within which Appellant was required to file his appeal. “When a statute fixes the time within which an appeal may be taken, the time may

not be extended as a matter of indulgence or grace.” ***Commonwealth v. Pena***, 31 A.3d 704, 706 (Pa. Super. 2011).

Based on the foregoing, we find that Appellant has failed to comply with the 30-day deadline for filing his notice of appeal pursuant to Pa.R.A.P. 903(a). Accordingly, we conclude that we are without jurisdiction and quash this appeal.⁵

Appeal quashed.

⁵ Furthermore, had Appellant filed a timely notice of appeal, this Court would nevertheless be precluded from reviewing the petition as Appellant has failed to plead or prove an exception to the PCRA time-bar. “A petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.” ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009); ***Commonwealth v. Fahy***, 737 A.2d 214, 223 (Pa. 1999) (stating that claims challenging the legality of sentence are subject to review within the PCRA, but must first satisfy the PCRA’s time limits); ***Commonwealth v. Jackson***, 30 A.3d 516, 521 (Pa. Super. 2011), *quoting Fahy, supra*.