

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MARSHA SCAGGS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 389 WDA 2012

Appeal from the Order of February 8, 2012
In the Court of Common Pleas of Lawrence County
Criminal Division at No(s): CP-37-CR-0000755-1987

BEFORE: STEVENS, P.J., BENDER, J., and WECHT, J.

MEMORANDUM BY WECHT, J.

Filed: February 4, 2013

Marsha Scaggs [Appellant"] appeals the February 8, 2012 order denying Appellant's Motion for Nunc Pro Tunc Relief entered in the Court of Common Pleas of Lawrence County. Upon review, we affirm.

The trial court set forth a summary of Appellant's convictions and sentences as follows:

On May 31, 1988, Appellant, Marsha Scaggs, was convicted by a jury of murder in the second degree, criminal conspiracy, kidnapping, and carrying a firearm without a license. The Appellant was sentenced on July 12, 1989, to life imprisonment for the murder charge; for the charge of criminal conspiracy, a term of no less than two years and no more than five years, to be served on a consecutive basis to the life sentence; and for the firearms charge, a term of no less than two years and no more than four years, also to be served on a consecutive basis to the life sentence. On July 26, 1989, a separate sentence for the charge of kidnapping was vacated by the [trial] court.

Trial Court Opinion ["T.C.O."], 2/8/12, at 1-2.

On June 1, 1990, we affirmed Appellant's judgment of sentence and our Supreme Court denied allowance of appeal. ***See Commonwealth v. Scaggs***, 578 A.2d 40 (Pa. Super. 1990) (unpublished memorandum), *appeal denied*, 585 A.2d 468 (Pa. 1991). Thereafter, Appellant pursued relief through the Post-Conviction Relief Act ["PCRA"], 42 Pa.C.S.A. §§ 9541-9546:

[Appellant], acting *pro se*, filed a PCRA petition on January 2, 1992, and the PCRA Court appointed counsel . . . to represent [Appellant]. . . . [O]n July 17, 1992, counsel filed a motion to withdraw and a "no merit" letter with the Court. On July 24, 1992, the PCRA Court . . . found that the petition lacked merit [and] grant[ed] counsel leave to withdraw [O]n February 3, 1993, the PCRA Court granted [Appellant] leave to proceed *pro se*

From that point forward, . . . [Appellant,] acting *pro se*, engaged in periodic correspondence with the PCRA Court until February 25, 2005, at which time she filed a petition for assignment of counsel. On the same date, the PCRA Court appointed Dennis Elisco, Esquire, to represent [Appellant]. Subsequently, on September 9, 2005, [Appellant] filed . . . [an] "Amendment for Withdrawal of Counsel *Inter Alia* Ineffective Assistance of Counsel," seeking to amend her prior petition to allege ineffective assistance on the part of Attorney Elisco [and] alleging that he had not notified her of his appointment [as] counsel. [Appellant], acting *pro se*, filed a petition captioned "Amended Post Conviction Relief Act." Attorney Elisco filed a petition to withdraw as counsel and on January 27, 2006, the PCRA Court granted Attorney Elisco's petition to withdraw and appointed current counsel to represent [Appellant].

On July 13, 2006, the Commonwealth filed a motion to dismiss the amended PCRA petition. The PCRA Court held a hearing on the petition addressing only the procedural posture of the petition and whether the Court should dismiss it as untimely. The PCRA Court dismissed the petition on the basis that [it] was time barred. [Appellant] filed an appeal with the Superior Court . . . , [which] held that [Appellant] Petition was not time-barred

and remanded the matter to the PCRA court to proceed further with the litigation on [Appellant's] petition.

T.C.O., 12/11/08, at 1-4. On December 11, 2008, the PCRA court denied Appellant's petition. Appellant appealed that denial. On October 29, 2009, we affirmed the PCRA court's denial. ***See Commonwealth v. Scaggs***, 987 A.2d 823 (Pa. Super. 2009) (unpublished memorandum).

On August 30, 2011, Appellant filed a petition for permission to file a post-sentence motion *nunc pro tunc*. The trial court summarized Appellant's argument advancing this petition:

The Appellant seeks *nunc pro tunc* relief from the Court in response to administrative changes made by the Pennsylvania Department of Corrections regarding its eligibility criteria for allowing inmates to participate in outside work release. The recent changes, promulgated in January 2011, render an inmate with any outstanding detainers ineligible for [a] work release program. Since the Appellant's charges of criminal conspiracy and carrying a firearm without a license are to be served on a consecutive basis to her life sentence and thus would not take effect until after the life sentence is served, the Appellant is ineligible for work release under the Department's new requirements. The Appellant is petitioning the Court to allow her to file a petition for modification of her outstanding sentences. Appellant, if *nunc pro tunc* relief were granted, would seek to have the Court consider her request to have the sentences run concurrently, which would make her eligible for the program under the Department's new policies. Whether the Appellant would actually be granted outside work release privileges would ultimately be determined by the Department.

T.C.O., 2/8/2012, at 1-2.

On February 8, 2012, the trial court denied Appellant's August 30, 2011 petition for permission to file a post-sentence motion *nunc pro tunc*.

This appeal followed. On March 8, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On March 20, 2012, Appellant timely complied. On February 8, 2012, the trial court filed its 1925(a) opinion. Appellant now raises one issue for our review: “Did the trial court abuse its discretion in denying Appellant’s Motion to Permit Nunc Pro Tunc Relief?” Appellant’s Brief at 4.

While Appellant did not style her petition as a PCRA petition, we must view it as such and review it under the PCRA framework. “We have repeatedly held that the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition.” ***Commonwealth v. Hutchins***, 760 A.2d 50, 52 n.1 (Pa. Super. 2000); 42 Pa.C.S.A. § 9545(b)(1)(3). Appellant’s judgment of sentence became final on or about April 3, 1991, upon the expiration of the 90-day period during which Appellant could have sought review from the United States Supreme Court following this Court’s affirmance and the Supreme Court’s denial of allowance of appeal. 42 Pa.C.S.A. § 9545(b)(1)(3). “Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final. . . . [A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” ***Id.***

Appellant filed this petition on August 30, 2011, well past the one-year time requirement. The petition is patently untimely.

Appellant can overcome this untimeliness if she pleads and proves one of the three exceptions to the time for filing the petition, as set forth at 42 Pa.C.S.A. §§ 9545(b)(1)(i), (ii), and (iii).¹ **See *Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000). To invoke an exception, a petitioner must plead it explicitly and satisfy the appropriate burden of proof. ***Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999). Appellant has not pleaded or proved any exception warranting relief under 42 Pa.C.S.

¹ Section 9545 provides, in relevant part:

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b).

§ 9545(b)(1)(i), (ii), or (iii). Therefore, the underlying petition was untimely, and neither the trial court nor this Court has jurisdiction. ***Commonwealth v. Taylor***, 933 A.2d 1035, 1038 (Pa. Super. 2007) (“Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.”). The trial court did not err in dismissing the petition.

Order affirmed. Jurisdiction relinquished.