

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ANDRES E. NUNEZ,	:	
	:	
Appellant	:	No. 402 MDA 2013

Appeal from the Order Entered January 29, 2013,
In the Court of Common Pleas of Lebanon County,
Criminal Division, at No. CP-38-CR-0001581-2009.

BEFORE: SHOGAN, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 06, 2013**

Appellant, Andres E. Nunez, appeals from the order entered on January 29, 2013 that denied his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On August 12, 2009, Appellant was charged with criminal solicitation to commit intimidation of a witness. On January 20, 2010, Appellant pled guilty to the aforementioned crime, and on July 14, 2010, the trial court sentenced Appellant to a term of three months to two years minus one day of total confinement to be served in the Lebanon County Jail.

On August 7, 2012, Appellant filed a *pro se* PCRA petition because he was allegedly detained by United States Immigration and Customs Enforcement ("ICE") on May 9, 2012, in relation to the underlying

conviction.¹ In the PCRA petition, Appellant asserted that his plea counsel was ineffective for failing to inform him that he could be deported as a result of the guilty plea. The Commonwealth responded by filing a motion to dismiss in which it argued that Appellant's PCRA petition was untimely. Motion to Dismiss PCRA Petition, 8/30/12. Counsel was appointed, and the PCRA court held a hearing in this matter on December 17, 2012. The PCRA court provided both parties thirty days to brief the issue. Order, 12/17/12. In an order filed on January 29, 2013, the PCRA court denied Appellant's PCRA petition finding that it was without jurisdiction to address the petition because it was untimely. Appellant filed a timely appeal from the order denying relief.

In this appeal, Appellant argues that the trial court erred in dismissing his PCRA petition as untimely. Appellant's Brief at 4. Upon review, we conclude that we need not reach Appellant's timeliness issue because the trial court was without jurisdiction in this matter on an alternate basis.²

¹ We are constrained to denote ICE's involvement as "alleged" because there is no documentation in the certified record regarding ICE or deportation. What is not in the record does not exist for purposes of appellate review. **See Commonwealth v. Rush**, 959 A.2d 945, 949 (Pa. Super. 2008) (appellate courts review only facts and documents in the certified record and will not consider assertions in an appellate brief or a trial court opinion).

² This Court is not bound by the rationale for the decision of the trial court, and we may affirm on any correct basis supported in the record. **Commonwealth v. Doty**, 48 A.3d 451, 456 (Pa. Super. 2012).

Our standard of review of an order denying PCRA relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. **Commonwealth v. Phillips**, 31 A.3d 317, 319 (Pa. Super. 2011), *appeal denied*, 42 A.3d 1059 (Pa. 2012) (citing **Commonwealth v. Berry**, 877 A.2d 479, 482 (Pa. Super. 2005)). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. **Id.** (citing **Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001)).

As noted above, the PCRA court denied relief because it found that Appellant's PCRA petition was untimely, having been filed more than one year after Appellant's judgment of sentence became final.³ Upon review, we agree with the order dismissing Appellant's PCRA petition but on different grounds. The basis for our decision is that, because Appellant was no longer serving a sentence, he was ineligible for PCRA relief.

It is well settled that in order to be "eligible for relief under the PCRA, a petitioner must be: (i) currently serving a sentence of imprisonment,

³ A PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition. **Commonwealth v. Murray**, 753 A.2d 201, 203 (Pa. 2000). A judgment of sentence "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." 42 Pa.C.S.A. § 9545(b)(3).

probation or parole for the crime” 42 Pa.C.S.A. § 9543(a)(1). Our Supreme Court has explained that this provision precludes PCRA relief “where the petitioner is no longer serving a sentence for the crime at the time the PCRA court renders a decision.” **Commonwealth v. Smith**, 17 A.3d 873, 904 (Pa. 2011) (citing **Commonwealth v. Ahlborn**, 699 A.2d 718 (Pa. 1997)). Once a petitioner’s sentence is completed, he becomes ineligible for relief, regardless of whether he was serving his sentence when he filed the petition. **Commonwealth v. Williams**, 977 A.2d 1174, 1176 (Pa. Super. 2009) (citation omitted).

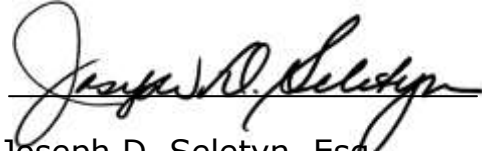
Here, on July 14, 2010, Appellant was sentenced to a minimum sentence of three months and to a maximum sentence of two years minus one day. Appellant’s maximum sentence on this conviction expired on July 13, 2012. Thus, Appellant was not serving a sentence at the time he filed the PCRA petition or when the PCRA court rendered its decision on January 29, 2013. Accordingly, Appellant is not eligible for PCRA relief. 42 Pa.C.S.A. § 9543(a)(1).

For the reasons set forth above, we conclude that Appellant is entitled to no relief. Therefore, we affirm the order dismissing Appellant’s PCRA petition.

Order affirmed.

J-S67014-13

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/6/2013