

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
VINCENT GARY RAE,	:	
	:	
Appellant	:	No. 408 WDA 2012

Appeal from the PCRA Order Entered February 2, 2012,
In the Court of Common Pleas of Fayette County,
Criminal Division, at No. CP-26-CR-0001199-2007.

BEFORE: SHOGAN, OTT and STRASSBURGER*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED: May 16, 2013

Appellant, Vincent Gary Rae, appeals the order entered February 2, 2012, dismissing his first petition for relief filed under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On January 9, 2008, Appellant pled guilty pursuant to a negotiated plea to conspiracy to commit arson and related offenses. The plea called for a sentence of one to two years of incarceration to be served concurrently with a sentence in Allegheny County. N.T. Guilty Plea, 1/9/08, at 2, 23.

During the plea colloquy, Appellant admitted to conspiring with Alton Noland and Carlton Brown to burn down Mr. Noland's residence at 117 West Fayette Street in Connellsville, Fayette County, Pennsylvania, so that Mr. Noland could collect the homeowner's insurance. *Id.* at 13, 15. Appellant

*Retired Senior Judge assigned to the Superior Court.

conceded that he transported a “torpedo” heater to the premises for the purpose of using the fuel it contained to start the fire. **Id.** at 15. The co-conspirators were arrested on the premises before the fire began. **Id.** at 17.

Following the plea colloquy, Appellant waived preparation of a pre-sentence investigation and requested immediate sentencing. The trial court indicated at the colloquy that the sentence “may not be able to be run . . . concurrent[ly]” with the Allegheny County sentence. **Id.** at 19. Nevertheless, the court imposed a sentence within the parameters of that agreement: one to two years of imprisonment, to run concurrently with the sentence Appellant was then serving. **Id.** at 23.

Appellant did not file a post-sentence motion or a direct appeal. More than three years later, Appellant filed a *pro se* PCRA petition on April 14, 2011, requesting dismissal of the charges, a new trial, or resentencing. Following the appointment of counsel, a hearing was held on October 13, 2011.

The PCRA Court determined that since Appellant did not file his PCRA petition until more than two years after the expiration of the one-year time bar of 42 Pa.C.S.A. § 9545, and did not prove any exception to the time bar of the statute, the petition was untimely filed. We agree.¹

¹ On October 31, 2012, this Court, in the wake of Appellant’s October 26, 2012 *pro se* motion indicating that he wished to proceed in this appeal *pro se*, remanded to the trial court to conduct a colloquy pursuant to

To be timely, a PCRA petition “shall be filed within one year of the date the judgment becomes final[.]” 42 Pa.C.S.A. § 9545(b)(1). A judgment is deemed 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).

In the case before us, since Appellant did not file a direct appeal, the judgment of sentence became final on February 9, 2008, upon expiration of the time to file an appeal to this Court. Thus, any PCRA petition must have been filed by February 9, 2009 to be considered timely. As Appellant did not file his PCRA petition until more than two years after February 9, 2009, it is untimely on its face. There are three statutory exceptions to the timeliness provision that provide limited circumstances excusing the late filing of a PCRA petition:

- (i) the failure to raise a 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

Commonwealth v. Grazier, 552 Pa. 9, 713 A.2d 81 (1998). The trial court filed an order on November 21, 2012, stating that following the ***Grazier*** hearing, “it is the finding of this Court that the Defendant does not wish to waive his right to counsel and to represent himself.” Order, 11/21/12, at 1. Therefore, the trial court ordered Appellant’s continued representation by court-appointed counsel, who filed the brief in this matter.

(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)(1). Any petition invoking an exception “shall be filed within 60 days of the date the claim could have been presented.”

42 Pa.C.S.A. § 9545(b)(2).

Herein, the PCRA Court explained that Appellant attempted to invoke the exception of § 9545(b)(1)(ii) by asserting he received a document from the Federal Bureau of Investigation indicating that pursuant to its investigation of the planned arson at 117 West Fayette Street, the United States Attorney declined to bring federal charges against Appellant. The trial court properly determined that this information did not satisfy the exception to the time constraints for filing a PCRA petition. The document, admitted into evidence at the PCRA hearing, did not contain a date of mailing or delivery to Appellant. The PCRA Court stated:

Even if the defendant had filed his petition within 60 days following the date of his receipt of the subject document from the FBI, this would not serve to create an exception that would permit the late filing of his Petition. The fact that the U.S. [A]ttorney may have declined to prosecute the defendant federally has no bearing upon his guilt or innocence under state law.

Trial Court Opinion, 2/3/12, at 7.

We further note that at the October 13, 2011 hearing, Appellant presented a letter he allegedly mailed to his plea counsel in which he

indicated that the Parole Board had advised him that the sentence imposed pursuant to his guilty plea “cannot run with my parole hit” N.T. (PCRA), 10/13/11, at 4, Exhibit B. That letter is dated June 26, 2008.² Appellant also offered an unsigned, undated letter, allegedly from the Fayette County Public Defender’s Office, which advised that he could choose to “except [sic] [the Parole Board’s] ruling or request the sentencing judge to withdraw your plea.” N.T. (PCRA), 10/13/11, at 5, Exhibit C. Appellant testified that he learned “a few months after sentencing,” in early 2008, that his sentence could not run concurrently. *Id.* at 4. Despite this information, and despite the admonition from the public defender’s office that he could seek to withdraw his plea, Appellant failed to file any PCRA petition until April 14, 2011. Clearly, Appellant’s awareness of any problem with his sentence became known to him in early 2008, which is more than sixty days prior to the filing of his PCRA petition. 42 Pa.C.S.A. § 9545(b)(2) (petition invoking exception must be filed within sixty days of the date the claim could have been presented).

In his brief to this Court, Appellant briefly reiterates his claim regarding his alleged illegal sentence. His only reference to the PCRA Court’s dismissal of his petition as untimely is his assertion that the court’s action was “inherently scapegoating, as the court’s purpose was to dismiss

² The PCRA court noted that the documents were unsigned and undated. N.T. (PCRA), 10/13/11, at 25.

Appellant's PCRA [petition], without any discussion of its' [sic] merits." Appellant's Brief at 8. He fails completely to make any argument regarding the timeliness of his PCRA petition.

We note that although illegal sentencing issues cannot be waived, they are required to be presented in a timely PCRA petition. **Commonwealth v. Taylor**, ___ A.3d ___, 2013 PA Super 89 (Pa. Super. 2013) (decided April 19, 2013) (citing **Commonwealth v. Fahy**, 558 Pa. 313, 737 A. 214 (1999)). Moreover,

The PCRA's time restrictions are jurisdictional in nature. Thus, if a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims.

Commonwealth v. Albrecht, 606 Pa. 64, 67-68, 994 A.2d 1091, 1093 (2010) (quoting **Commonwealth v. Chester**, 586 Pa. 468, ___, 895 A.2d 520, 522 (2006) (citations omitted).

In the absence of any argument on appeal, and in light of Appellant's failure to prove any exception to the one-year time bar of the PCRA, the PCRA Court correctly determined that Appellant's petition was untimely; the denial of relief in this case was proper.

Order affirmed.