

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

FRANCIS J. GAGATKO

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 467 WDA 2012

Appeal from the PCRA Order of February 22, 2012  
In the Court of Common Pleas of Washington County  
Criminal Division at No(s): CP-63-CR-0001348-2006

BEFORE: GANTMAN, J., WECHT, J., and FITZGERALD, J.\*

MEMORANDUM BY WECHT, J.

Filed: February 6, 2013

Francis J. Gagatko (“Appellant”) challenges the trial court’s order dismissing his petition under the Post-Conviction Relief Act (“PCRA”), 42 Pa.C.S. §§ 9541-46. Appointed counsel for the Appellant has filed a “no-merit” letter and a “Motion for Leave of Court to Withdraw as Counsel” (“Motion to Withdraw”), pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). We grant counsel’s Motion to Withdraw. We also affirm the trial court’s decision to dismiss Appellant’s PCRA petition without a hearing.

The trial court set forth the factual and procedural history as follows:

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\* Former Justice specially assigned to the Superior Court.

On September 11, 2006, this Court entered an Order accepting [Appellant's] plea of guilty to Robbery[,] a felony of the third degree. By the same Order, this Court sentenced [Appellant] to a period of confinement of three (3) to six (6) years to run concurrently with any other sentence [Appellant] was serving. [Appellant] did not file a direct appeal.

[Appellant] filed a *pro se* PCRA Petition on December 2, 2010, alleging as grounds for relief: (1) ineffective assistance of counsel; (2) the imposition of a sentence greater than the lawful maximum. This Court appointed counsel to represent [Appellant] throughout his PCRA proceedings. Appointed counsel filed a **Turner/Finley** no-merit letter on January 25, 2012, indicating that, in his opinion, the [petition] was not timely filed and is without substantive merit.<sup>1</sup>

<sup>1</sup> Appointed counsel in this case filed a no[-]merit letter, but did not file a petition to withdraw as would be procedurally appropriate. **Finley; Turner, supra.** "When, in the exercise of his professional judgment, counsel determines that the issues raised under the [PCRA] are meritless, and when the [PCRA] court concurs, counsel will be permitted to withdraw and the petitioner may proceed *pro se*, or by privately retained counsel, or not at all. The same procedure should be followed at any stage of the collateral proceedings, whether in a trial or appellate court." **Turner**, 544 A.2d at 928-29. . . . In this case, appointed counsel properly filed a **Turner/Finley** no-merit letter, however, counsel did not petition this Court for leave to withdraw from the case. . . . [I]f an attorney fails to withdraw as counsel, that attorney must continue the representation of the defendant until proper leave to withdraw is granted.<sup>[1]</sup>

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<sup>1</sup> We must acknowledge the apparent irregularity in PCRA counsel's approach to this case. The procedure that an attorney must follow when proceeding pursuant to **Turner/Finley** is well-settled. We have explained that exacting procedure as follows:

**Turner/Finley** counsel must . . . submit a 'no[-] merit' letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing  
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the issues which the petition wants to have reviewed, explaining why and how those issues lack merit, and **requesting permission to withdraw**.

**Counsel must also send to the petitioner: (1) a copy of the 'no[-]merit' letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.**

If counsel fails to satisfy the foregoing technical prerequisites of *Turner/Finley*, the court will not reach the merits of the underlying claims but, rather, will merely deny counsel's request to withdraw. Upon doing so, the court will then take the appropriate steps, such as directing counsel to file a proper *Turner/Finley* request or an advocate's brief.

However, where counsel submits a petition and no-merit letter that do satisfy the technical demands of *Turner/Finley*, the court—trial court or this Court—must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief. By contrast, if the claims appear to have merit, the court will deny counsel's request and grant relief, or at least instruct counsel to file an advocate's brief.

***Commonwealth v. Wrecks***, 931 A.2d 717, 721 (Pa. Super. 2007) (citations omitted; emphasis added).

In this case, PCRA counsel failed to seek to withdraw as counsel before the PCRA court, but has done so before this Court. Moreover, although counsel has certified to this Court that he furnished Appellant with the no-merit letter and an explanation of Appellant's rights, and indicates that the letter is attached to his petition, he has failed, in fact, to attach that letter to any filing in the PCRA court or this Court. **See** Motion to Withdraw, 6/15/2012.

That being said, our Supreme Court has held that, where the adequacy of PCRA counsel's *Turner/Finley* compliance is not raised on appeal, we may not consider it. ***Commonwealth v. Pitts***, 981 A.2d 875, 880 (Pa. 2009). As well, as examined *infra*, Appellant **has** filed a *pro se* "Additional Amendment Appeal" in the wake of counsel's no-merit letter and Motion to Withdraw, which strongly suggests that he was adequately informed, or  
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This Court filed a Notice of Intent to Dismiss [Appellant's] PCRA Petition on January 30[], 2012, and filed an Order dismissing the Petition on February 22, 2012. [Appellant], through PCRA counsel, filed a Notice of Appeal and Concise Statement of [Errors] Complained of on Appeal in a timely fashion. [Appellant] avers that this Court erred in dismissing the PCRA Petition without a hearing.

Trial Court Opinion, 4/10/2012 ("T.C.O."), at 1-2 (citations modified). Based upon the above-recited dates, the trial court dismissed Appellant's petition as untimely, and observed that it consequently lacked jurisdiction to review the merits of the petition or to conduct an evidentiary hearing. *Id.* at 2-3. We agree.

The issues reviewed by counsel in his no-merit letter are adequately addressed by the trial court. Appellant's *pro se* "Additional Amendment Appeal" ("Appellant's Amendment"), filed in this Court *pro se* following counsel's Motion to Withdraw, reinforces counsel's recitation of the grounds for relief that Appellant seeks to assert. Therein, Appellant raises various challenges to the legality of his sentence,<sup>2</sup> and corollary challenges to PCRA  
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otherwise aware, of his rights. For these reasons, and in the interest of finality, we will overlook counsel's errors and omissions.

<sup>2</sup> Specifically, Appellant contends, first, that he has been denied the benefit of the sentence entered in this matter, which the trial court imposed to run concurrently with his then-outstanding probationary sentence, because the board of probation and parole refuses to recognize that aspect of the trial court's sentencing order by operation of 42 Pa.C.S. § 9760. However, that provision, which addresses credit for time served, does not appear to bear on any such question, and Appellant cites no authority to the contrary. As well, Appellant argues that his sentence of three to six years' incarceration, which undisputedly falls within the statutory maximum  
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counsel's decision not to advocate these issues on Appellant's behalf. Appellant also expresses his belief that his challenge to the legality of his judgment of sentence cannot be waived. **See generally** Appellant's Amendment, 6/29/2012. Appellant is mistaken.

Our jurisdiction to hear challenges to the legality of sentence remains circumscribed by the one-year time-bar imposed upon petitions for PCRA relief, as modified by the PCRA's narrow set of available exceptions to that time limit. In ***Commonwealth v. Jackson***, we articulated the timeliness standards under the PCRA as follows:

The PCRA "provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." 42 Pa.C.S.A. § 9542. When an action is cognizable under the PCRA, the PCRA is the "sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose[.]" 42 Pa.C.S.A. § 9542.

In order for a court to entertain a PCRA petition, a petitioner must comply with the PCRA filing deadline. ***See Commonwealth v. Robinson***, 837 A.2d 1157, 1161 (Pa. 2003). The time for filing a petition is set forth in 42 Pa.C.S.A. § 9545(b), which provides in relevant part:

**(b) Time for filing petition.—**

(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:

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sentence for a felony of the third degree, was excessive in light of the above consideration. Neither of these challenges appears to have any merit.

(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.

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42 Pa.C.S.A. § 9545(b).

"[T]he time limitations pursuant to . . . the PCRA are jurisdictional." ***Commonwealth v. Fahy***, 737 A.2d 214, 222 (Pa. 1999). "[Jurisdictional time] limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits." ***Id.*** "If the petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition." ***Commonwealth v. Perrin***, 947 A.2d 1284, 1285 (Pa. Super. 2008).

***Commonwealth v. Jackson***, 30 A.3d 516, 518-19 (Pa. Super. 2011), *appeal denied*, 47 A.3d 845 (Pa. 2012).

PCRA counsel discerned, and hence pleaded, no exceptions to the PCRA's jurisdictional time-bar. Before this Court, Appellant in no way asserts the application of any exception to the PCRA's one-year time limit. Instead, Appellant expresses his "understanding under [42 Pa.C.S. § 9543]

that an illegal sentence can never be waived for purposes of correction.” Appellant’s Amendment at 1.

This is true, speaking strictly, of claims regarding the legality of a sentence. ***Commonwealth v. Foster***, 960 A.2d 160, 163 (Pa. Super. 2008). However, although “not technically waivable, a legality [of sentence] claim may nevertheless be lost should it be raised for the first time in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim.” ***Commonwealth v. Slotcavage***, 939 A.2d 901, 903 (Pa. Super. 2007) (citing ***Commonwealth v. Fahy***, 737 A.2d 214, 223 (Pa. 1999) (“Although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA’s time limits or one of the exceptions thereto.”)).

Appellant’s judgment of sentence was imposed on September 11, 2006, following his guilty plea. He did not file a direct appeal. Accordingly, his judgment of sentence became final on or about October 11, 2006. His *pro se* PCRA petition was filed on December 2, 2010, well beyond the one-year deadline. Appellant has not pleaded the applicability of an enumerated exception to the PCRA’s time limits, notwithstanding that his *pro se* Amendment followed PCRA counsel’s no-merit letters before the trial court and this Court, both of which focused on the untimeliness of Appellant’s filing. For these reasons, the trial court lacked jurisdiction to grant Appellant relief, and hence committed no error in dismissing his petition without a hearing.

Motion to Withdraw granted. Order affirmed. Jurisdiction  
relinquished.