

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ARTHUR WHITAKER

Appellant

No. 485 EDA 2012

Appeal from the PCRA Order January 17, 2012
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0005854-2007

BEFORE: GANTMAN, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, J.:

Filed: April 26, 2013

Appellant, Arthur Whitaker, appeals from the order entered in the Lehigh County Court of Common Pleas, denying his second petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm and grant counsel's petition to withdraw.

The PCRA court summarized the relevant facts and procedural history of this case as follows:

[Appellant] was charged in this case with two counts of aggravated assault, and one count each of simple assault, endangering the welfare of a child, terroristic threats, and recklessly endangering another person. On August 26, 2008, [Appellant] pleaded guilty in front of the Honorable

¹ 42 Pa.C.S.A. §§ 9541-9546.

*Retired Senior Judge assigned to the Superior Court.

*Judge Platt did not participate in the consideration or decision of this case.

William H. Platt to one count of aggravated assault and endangering the welfare of a child. There was an agreement that the minimum sentence would be 24 months and the charges would run concurrently. The plea was accepted, and Judge Platt ordered a presentence investigation report (PSI). On September 30, 2008, Judge Platt sentenced [Appellant] on the aggravated assault charge to a term of imprisonment of not less than 2 nor more than 10 years in a state correctional institution, and on the endangering the welfare of a child charge to a term of imprisonment not less than 1 year nor more than 3 years in a state correctional institution. The sentences were ordered to be served concurrently. At the time of the guilty plea and sentencing hearing, [Appellant] was represented by Richard Webster, Esquire, Deputy Public Defender.

On October 24, 2008, [Appellant] filed a post-sentence motion to reconsider and modify sentence, *nunc pro tunc*. On January 2, 2009, Judge Platt denied [Appellant's] motion for *nunc pro tunc* relief without reaching the merits of the motion. [Appellant] filed a notice of appeal on January 30, 2009. On April 6, 2009, the Superior Court quashed the appeal as untimely filed from the judgment of sentence imposed on September 30, 2008.

On February 23, 2010, [Appellant] filed a *pro se* PCRA petition. Judge Platt appointed Robert Long, Esquire, to represent the defendant in the PCRA matter, and ordered Attorney Long to file an amended PCRA petition. On May 11, 2010, Attorney Long filed an amended petition alleging ineffective assistance of trial counsel. A hearing on the petition was scheduled for August 9, 2010. On that date, [Appellant] failed to appear for his hearing, and Judge Platt dismissed the petition.^[2]

² We observe that Appellant's untimely post-sentence motion did not toll the 30-day appeal period, which ultimately led the Superior Court to quash Appellant's appeal as untimely. Under those circumstances, Appellant's judgment of sentence became final on or about October 30, 2008, upon expiration of the 30-day appeal period. **See Commonwealth v. Brown**, 596 Pa. 354, 361, 943 A.2d 264, 268 (2008) (holding: "Where an appellant (Footnote Continued Next Page)

On June 2, 2011, [Appellant] filed a second *pro se* PCRA petition and the case was reassigned to [the Honorable James T. Anthony]. By order dated June 17, 2011, [the PCRA court] appointed Charles Banta, Esquire, to represent [Appellant].... On October 26, 2011, a hearing on the petition was held, at which time [Appellant], Attorney Long, and Attorney Webster testified. The parties agreed that the only issues before [the PCRA court] were whether the petition was timely filed, and if so, whether Attorney Webster provided ineffective assistance of counsel for failing to file a timely post-sentence motion.

(PCRA Court Opinion, dated January 17, 2012, at 1-3) (footnotes omitted).

On January 17, 2012, the PCRA court denied Appellant's petition. Appellant timely filed a notice of appeal on February 2, 2012. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant timely complied.

As a preliminary matter, counsel has filed a petition to withdraw pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (1988). "Before an attorney can be permitted to withdraw from representing a petitioner **under the PCRA**, Pennsylvania law requires counsel to file and obtain approval of a 'no-merit' letter pursuant to the mandates of ***Turner/Finley***." ***Commonwealth v. Karanicolas***, 836 A.2d 940, 947 (Pa.Super. 2003)

(emphasis in original).

(Footnote Continued) _____

does not timely file a direct appeal, judgment becomes final 30 days after imposition of sentence"). As a result, Appellant's first PCRA petition, filed on February 23, 2010, was also untimely on its face.

[C]ounsel 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 the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa.Super. 2007). Counsel must also send to the petitioner a copy of the “no-merit” letter or brief and motion to withdraw and advise the petitioner of his right to proceed *pro se* or with new counsel. ***Id.*** “Substantial compliance with these requirements will satisfy the criteria.” ***Karanicolas, supra.***

Instantly, counsel filed a ***Turner/Finley*** letter brief on appeal and a motion to withdraw as counsel. Counsel listed the issue Appellant wished to raise and thoroughly explained why the issue merits no relief. Counsel sent a copy of the letter filed on appeal to Appellant, which included a statement of Appellant’s right to proceed *pro se* or with private counsel; along with a copy of counsel’s petition to withdraw. Thus, counsel has substantially complied with the ***Turner/Finley*** requirements. ***See Karanicolas, supra.*** Accordingly, we proceed to an independent evaluation. ***See Commonwealth v. Porter***, 556 Pa. 301, 310, 728 A.2d 890, 894 (1999) (stating appellate court must conduct independent analysis and agree with counsel that appeal is frivolous).

Appellant has not filed a *pro se* brief or a counseled brief with newly retained counsel; therefore, we will review the issue addressed in PCRA counsel’s ***Turner/Finley*** letter brief; specifically whether the PCRA court

improperly denied Appellant's PCRA petition. (*See Turner/Finley* Letter Brief at 1-3).

Appellant claims his trial counsel provided ineffective assistance when he failed to file a timely post-sentence motion to reconsider Appellant's sentence. Counsel nevertheless observes that Appellant filed his current PCRA petition on June 2, 2011. Counsel concludes Appellant's petition was untimely and did not qualify for any of the PCRA timeliness exceptions. We agree.

As a prefatory matter, the timeliness of a PCRA petition is a jurisdictional requisite. *Commonwealth v. Hackett*, 598 Pa. 350, 956 A.2d 978 (2008), *cert. denied*, 528 U.S. 1163, 129 S.Ct. 2772, 174 L.Ed.2d 277 (2009). Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. *Commonwealth v. Robinson*, 575 Pa. 500, 508, 837 A.2d 1157, 1161 (2003). The PCRA requires a petition, including a second or subsequent petition, to be filed within one year of the date the underlying 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 review." 42 Pa.C.S.A. § 9545(b)(3). Absent timely filing of a post-sentence motion a defendant's appeal period begins to run from the date judgment of

sentence is imposed. ***Commonwealth v. Dreves***, 839 A.2d 1122, 1127 (Pa.Super. 2003) (*en banc*). ***See also Brown, supra***.

Generally, to obtain merits review of a PCRA petition filed more than one year after a petitioner's sentence became final; the petitioner must allege and prove at least one of the three timeliness exceptions. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). To invoke an exception, the petitioner must allege and prove:

(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)(1)(i)-(iii). “[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims.” ***Commonwealth v. Gamboa-Taylor***, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Instantly, Appellant pled guilty to aggravated assault and endangering the welfare of a child; and on September 30, 2008, the court sentenced Appellant to an aggregate two (2) to ten (10) years' incarceration. Thereafter, Appellant filed an untimely post-sentence motion for reconsideration of sentence on October 24, 2008; and on January 30, 2009, Appellant filed an untimely notice of appeal. Thus, Appellant's judgment of sentence became final on or about October 30, 2008. **See** 42 Pa.C.S.A. § 9545(b)(3); **Brown, supra**; **Dreves, supra**. Appellant filed his current PCRA petition on June 2, 2011, which was over one and one-half years late and untimely on its face. **See** 42 Pa.C.S.A. § 9545(b)(1). Further, Appellant did not plead and prove one or more of the statutory exceptions to the PCRA time limits. Therefore, Appellant's PCRA petition remained time barred, and the court correctly concluded it lacked jurisdiction to consider it. **See Gamboa-Taylor, supra**. Accordingly, we affirm the order denying PCRA relief and grant counsel's petition to withdraw.

Order affirmed; petition to withdraw granted.