

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

GREGORY JOHNSON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 550 MDA 2012

Appeal from the Order Entered January 27, 2012
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-0001603-1998

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.:

Filed: February 15, 2013

Appellant, Gregory Johnson appeals from the January 27, 2012 order dismissing his second petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546.¹ PCRA counsel has also filed a petition to withdraw as counsel along with an **Anders** brief.² After careful

* Retired Senior Judge assigned to the Superior Court.

¹ We note the Commonwealth has not filed a brief in this matter.

² **Anders v. California**, 386 U.S. 738 (1967). Although counsel has submitted an **Anders** brief to this Court, we note that in the PCRA context, counsel should have filed a no-merit letter in accordance with **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), and their progeny. **Commonwealth v. Widgins**, 29 A.3d 816, 817 n.1 (Pa. Super. 2011). However, "[b]ecause an **Anders** brief provides greater protection to a defendant, this Court may accept an **Anders** brief in lieu of a **Turner/Finley** letter." **Id.** (citation omitted).

review, we affirm the PCRA court's order and grant counsel's petition to withdraw.

This case has a long and tortuous history in both the trial and appellate courts. Therefore, we only summarize the facts and procedural history of this case that are relevant to the instant appeal. On January 21, 1999, a jury found Appellant guilty of one count of aggravated assault, two counts of simple assault, two counts of aggravated harassment of a prisoner, and three counts of harassment.³ On March 1, 1999, the trial court imposed an aggregate sentence of 39 to 78 months' imprisonment to run consecutive to a previously imposed sentence. On July 17, 2000, this Court affirmed Appellant's judgment of sentence. ***Commonwealth v. Johnson***, 761 A.2d 1235 (Pa. Super. 2000) (unpublished memorandum). Appellant did not seek further appellate review from our Supreme Court.

On September 21, 2000, Appellant timely filed his first PCRA petition. After three remands between 2002 and 2007, this Court affirmed the PCRA court's denial of post-conviction relief on September 21, 2007, our Supreme Court denied *allocatur* on March 12, 2008, and the United States Supreme Court denied Appellant's petition for a writ of *certiorari* on October 8, 2008. ***Commonwealth v. Johnson***, 938 A.2d 1115 (Pa. Super. 2007)

³ 18 Pa.C.S.A. §§ 2702(a)(3), 2701(a)(1), 2703.1 and 2709, respectively.

(unpublished memorandum), *appeal denied*, 945 A.2d 168 (Pa. 2008), *cert. denied*, ***Johnson v. Pennsylvania***, 555 U.S. 868 (2008).

On March 18, 2011, Appellant filed his second PCRA petition, arguing that the trial court imposed an illegal sentence. The PCRA court appointed Jeffrey A. Yelen, Esquire (Attorney Yelen) to represent Appellant on April 7, 2011. The Commonwealth filed its opposition to Appellant's petition on May 20, 2011. Thereafter, Attorney Yelen filed a petition to withdraw with the PCRA court on August 25, 2011, and Appellant responded to Attorney Yelen's petition on October 14, 2011. On December 13, 2011, the PCRA court held a hearing. On January 27, 2012, the PCRA court entered an order dismissing Appellant's second PCRA petition, but did not address Attorney Yelen's petition to withdraw as counsel.

On February 27, 2012, Appellant, through Attorney Yelen, filed a timely notice of appeal.⁴ On the same day, Attorney Yelen filed a motion

⁴ We note that the 30th day for Appellant to file his notice of appeal fell on Sunday, February 26, 2012. When computing the 30-day filing period "[if] the last day of any such period shall fall on Saturday or Sunday ... such day shall be omitted from the computation." 1 Pa.C.S.A. § 1908. Therefore, the 30th day actually fell on February 27, 2012, and Appellant's notice of appeal was timely.

We further observe that the PCRA court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), and the PCRA court did not file a Rule 1925(a) opinion. The PCRA court did, however, file an opinion accompanying its January 27, 2012 order dismissing Appellant's PCRA petition. Therefore, since we are able to discern the PCRA court's reasoning (*Footnote Continued Next Page*)

with the PCRA court to appoint appellate counsel and allow him to withdraw. On March 5, 2012, the PCRA court granted Attorney Yelen's motion, allowing him to withdraw and appointing Paul Galante (Attorney Galante) to represent Appellant in this appeal. On December 10, 2012, Attorney Galante filed his petition to withdraw styled as an **Anders** brief.

On appeal, Attorney Galante advances the following issue on Appellant's behalf.

Whether the PCRA court erred in dismissing Appellant's PCRA [p]etition as untimely pursuant to 42 Pa.C.S.A. § 9545

Anders Brief at 3.

"Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." **Id.** "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." **Commonwealth v.** (Footnote Continued) _____

for its decision, we decline to remand this case and may proceed to the merits of Appellant's appeal. **See Commonwealth v. Hood**, 872 A.2d 175, 178 (Pa. Super. 2005) (stating "the lack of a Rule 1925(a) opinion is not always fatal to [appellate] review, because we can look to the record to ascertain the reasons for the order"), *appeal denied*, 889 A.2d 88 (Pa. 2005).

Spotz, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). “However, this Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” *Id.*

Prior to considering Appellant’s arguments, we must first review Attorney Galante’s request to withdraw from representation. As delineated by our Supreme Court, the requirements counsel must adhere to when requesting to withdraw include the following.

- 1) A “no-merit” letter by PC[R]A counsel detailing the nature and extent of his review;
- 2) The “no-merit” letter by PC[R]A counsel listing each issue the petitioner wished to have reviewed;
- 3) The PC[R]A counsel’s “explanation”, in the “no-merit” letter, of why the petitioner’s issues were meritless[.]

Commonwealth v. Pitts, 981 A.2d 875, 876 (Pa. 2009), quoting **Finley**, *supra* at 215. “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.” **Commonwealth v. Wrecks**, 931 A.2d 717, 721 (Pa. Super. 2007).

[W]here 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.

Id. (citation omitted).

Instantly, we determine that Attorney Galante has complied with the requirements of *Turner/Finley*. Specifically, counsel's *Anders* brief shows the nature and extent of counsel's review, addresses the claim Appellant raised in his PCRA petition and determines that the issue lacks merit. Attorney Galante also provides a discussion of Appellant's claim, explaining why the issue is without merit. Additionally, Attorney Galante served Appellant with a copy of the petition to withdraw and the *Anders* brief, advising Appellant that, if he was permitted to withdraw, Appellant had the right to proceed *pro se* or with privately retained counsel. To date, Appellant has not filed any response. We therefore may proceed to conduct an independent merits review of Appellant's appeal.

Before we may address the merits of a PCRA petition, we must first consider the petition's timeliness because it implicates the jurisdiction of both this Court and the PCRA court. *Commonwealth v. Williams*, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). "Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition." *Id.* The PCRA "confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]" *Commonwealth v. Watts*, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). This is to "accord finality to the collateral review process." *Id.* "A petition

for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met." *Commonwealth v. Harris*, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009). The act provides as follows.

§ 9545. Jurisdiction and proceedings

...

(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:

(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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

...

42 Pa.C.S.A. § 9545(b).

As noted above, Appellant was sentenced on March 1, 1999 and this Court affirmed his judgment of sentence on July 17, 2000. As a result, Appellant's judgment of sentence became final on August 16, 2000, when the period for Appellant to file a petition for allowance of appeal in our Supreme Court expired. **See id.** § 9545(b)(3). Appellant therefore had until August 16, 2001 to file a timely PCRA petition. Appellant filed the instant petition on March 18, 2011, almost 11 years after his judgment of sentence became final, and it is therefore patently untimely. Appellant does not allege that any of the three exceptions of section 9545(b)(1) applies. **See Harris, supra** at 1199-1200.

Instead, Appellant argues that his petition is timely because his petition challenges the legality of his sentence. **Anders** Brief at 8. It is true that in general challenges to the legality of an appellant's sentence cannot be waived. **See Commonwealth v. Stein**, 39 A.3d 365, 367 (Pa. Super. 2012) (direct appeal); **Commonwealth v. Markowitz**, 32 A.3d 706, 711-712 (Pa. Super. 2011) (PCRA), *appeal denied*, 40 A.3d 1235 (Pa. 2012). However, our Supreme Court has consistently held that in the PCRA context,

a challenge to the legality of the sentence does not amount to an exception to the PCRA time-bar.

In ***Commonwealth v. Fahy***, 737 A.2d 214 (Pa. 1999), the appellant advanced this very argument to our Supreme Court. The ***Fahy*** Court rejected the appellant's contention that because his PCRA petition challenged the legality of his sentence, the PCRA time-bar did not apply.

Appellant's fourth contention is that his petition cannot be barred as untimely because to do so would result in the execution of an illegal sentence of death. Appellant offers that even if untimely, a petitioner's claims will always be considered on the merits when the claims challenge the legality of the sentence. Appellant is mistaken. 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. Thus, Appellant's contention is easily dismissed.

Id. at 223. As we are bound by our Supreme Court's decision in ***Fahy***, we conclude Appellant's argument is without merit. Upon our review of the record, Appellant has not alleged any other exception to the PCRA time-bar.⁵

See Harris, supra at 1199-1200. We therefore agree with Attorney Galante that Appellant's issue is wholly without merit.

⁵ Attorney Galante refers to the fact that Appellant has had multiple attorneys since our Supreme Court denied his petition for allowance of appeal for his first PCRA petition in 2008. ***Anders*** Brief at 8. However, this does not allege an exception to the PCRA time-bar, as Appellant's judgment of sentence became final on August 16, 2000, eight years prior.

Based on the foregoing, we conclude the PCRA court properly dismissed Appellant's second PCRA petition as untimely. Accordingly, we affirm the PCRA court's January 27, 2012 order and grant Attorney Galante's petition to withdraw.

Order affirmed. Petition to withdraw as counsel granted.