

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERT COPELAND COMRIE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 551 WDA 2012

Appeal from the Order Entered January 13, 2012
in the Court of Common Pleas of Clearfield County,
Criminal Division, at No(s): CP-17-CR-0000134-2002

BEFORE: BENDER, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY BENDER, J.:

Filed: February 26, 2013

Robert Copeland Comrie (Appellant) appeals *pro se* from the order dated January 13, 2012, that denied Appellant's *pro se* petition for writ of *habeas corpus*, filed on January 3, 2012, which was treated by the trial court as an untimely petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§9541-9546.¹ After review, we affirm the trial court's dismissal of Appellant's petition.

¹ Attached to his brief filed in this Court, Appellant includes an order dated February 3, 2012, that responds to Appellant's *pro se* petition for writ of *habeas corpus* naming as respondent, Warden Samuel Lombardo, Clearfield County Jail. Although Appellant claims the February 3, 2012 order is the one from which he is presently appealing, his notice of appeal provides the caption and common pleas docket number from his criminal case at No. CP-17-000013-2002, and his brief includes no discussion or argument directed at Warden Lombardo. Moreover, the February 3, 2012 order contains the common pleas court docket No. 2012-90-CD, which the trial court identifies (*Footnote Continued Next Page*)

In a prior appeal Appellant filed in this Court, we set forth the extensive factual and procedural history of this case as follows:

In January 2002, Appellant was arrested by federal officials and charged with a number of federal crimes. On February 1, 2002, while Appellant was in federal custody, the Pennsylvania State Police separately charged Appellant with possession of marijuana with the intent to distribute, conspiracy to possess marijuana with the intent to distribute, and other, related crimes. On October 3, 2002, Appellant entered an open guilty plea to the Pennsylvania charges and was sentenced, in the Court of Common Pleas of Clearfield County, to serve a term of three to five years in prison.

After his Clearfield County judgment of sentence became final, Appellant filed a timely PCRA petition and claimed that his plea counsel was ineffective for failing to advise him of his right to file a suppression motion. Amended PCRA Petition, 5/28/04, at 1. The PCRA court agreed with Appellant and granted Appellant a new trial. PCRA Court Order, 9/30/04, at 1.

Rather than proceed to trial, on December 17, 2004, Appellant pleaded guilty to possession of marijuana with the intent to deliver. Negotiated Plea Agreement, 12/17/04, at 1. For this conviction, and in accordance with a negotiated plea agreement, Appellant was sentenced to serve a term of two to four years in prison, with the term of incarceration to be served

(Footnote Continued) _____

as a civil action, in which Appellant is also attempting to raise issues challenging his state sentence. The trial court explains that these arguments should be raised in the criminal matter, which we conclude is the appeal presently before this Court at No. 551 WDA 2012. No appeal from the civil case, identified as docketed at No. 2012-90-CD, appears to have been filed. Accordingly, we conclude that this appeal arises from the January 13, 2012 order, and is untimely. **See** Pa.R.A.P. 903 (appeal shall be filed within 30 days after the entry of the order appealed from). Contrarily, we recognize that if the appeal had arisen from the February 3, 2012 order, it would have been timely. Therefore, and despite the discrepancy just outlined, we attempt to address the issues that Appellant has raised in this appeal, regardless of which order prompted the appeal.

"consecutive to any federal sentence currently being served by [Appellant]."² Sentencing Order, 12/17/04, at 1. Appellant did not file a direct appeal from his judgment of sentence. Therefore, since January 16, 2005 was a Sunday, Appellant's judgment of sentence became final on January 17, 2005 – which was 30 days after the trial court sentenced Appellant and the time for filing a direct appeal to this Court expired. **See** Pa.R.A.P. 903(a); 1 Pa.C.S.A. § 1908.

On October 21, 2008 – almost four years after Appellant's judgment of sentence became final – Appellant filed a "Motion to Vacate and Set Aside the Judgment of Conviction Pursuant to **United States v. Morgan**, 346 U.S. 502 (1954) [and] 42 Pa.C.S.A.[] § 5505" (hereinafter "Motion to Vacate"). The "Motion to Vacate" raised ineffective assistance of counsel claims, as well as claims that the trial court erred in accepting Appellant's plea. **See** Appellant's Motion to Vacate, 10/21/08, at 7-8. On November 17, 2008, the trial court entered an order holding that: Appellant's "Motion to Vacate" was to be construed as a PCRA petition; Appellant's PCRA petition was untimely, as it was filed more than one year after Appellant's judgment of sentence became final; and, since "no purpose would be served by further proceedings," the court intended to dismiss Appellant's PCRA petition, without a hearing, in 20 days. Notice of Intent to Dismiss, 11/17/08, at 1-2. On December 18, 2008, the PCRA court entered an order finally dismissing Appellant's PCRA petition. PCRA Court Order, 12/18/08, at 1-2. Appellant did not file an appeal from this final order.

Thereafter, Appellant filed a second and a third PCRA petition in the PCRA court. The PCRA court properly dismissed these serial PCRA petitions as untimely filed. PCRA Court Order, 7/20/09, at 1; PCRA Court Order, 9/8/09, at 1. Appellant did not file a notice of appeal from either of the PCRA court's final orders.

On December 11, 2009, while Appellant was still serving his federal prison sentence, Appellant filed the current PCRA petition. This petition – which was the fourth petition Appellant filed under the PCRA – was titled "Motion for Post Conviction Hearing Act" and raised a number of claims, including that: Appellant's Pennsylvania state sentence was illegal, as Appellant was not properly granted credit for the time he served prior to sentencing; Clearfield County erroneously lodged a detainer

against Appellant on December 12, 2008 as Appellant had “already served most of his [Pennsylvania] sentence;” and, counsel was ineffective during the plea process. Appellant’s Fourth PCRA Petition, 12/11/09, at 4. In an attempt to circumvent the PCRA’s one-year time-bar, Appellant claimed that he had only learned of the detainer on December 20, 2008 and that, “by law, [Appellant] would have one (1) year from receipt of said detainer to file said PCRA.” *Id.*

The Commonwealth responded to Appellant’s fourth PCRA petition and asserted that the petition must be dismissed as untimely. Motion for Status Conference, 4/27/11, at 1. The Commonwealth, however, “agreed to permit” the PCRA court the ability to address the “sole issue of time credit.” *Id.*; Commonwealth’s Brief at 5. Following a status conference – during which the Commonwealth agreed to Appellant’s request for time credit – the PCRA court entered an order granting Appellant’s PCRA petition in part. Specifically, the PCRA court granted Appellant’s “request to amend his sentencing order . . . [so that Appellant w]ould receive time credit for the period between January 19, 2002 to December 22, 2004.” The PCRA court thus granted Appellant relief and amended Appellant’s sentencing order, awarding Appellant credit for the time he served in prison prior to sentencing. PCRA Court Order, 6/9/11, at 1. The PCRA court dismissed the remainder of Appellant’s PCRA petition without a hearing – presumably because the petition was untimely. *Id.* at 1-2.

Appellant filed a timely notice of appeal and now raises a number of claims in his *pro se* brief. We, however, conclude that the PCRA court did not have subject matter jurisdiction over Appellant’s PCRA petition and, therefore, the PCRA court lacked authority to address Appellant’s claims or grant Appellant any relief in this case. The portion of the court’s order granting Appellant post-conviction collateral relief is void and must be vacated; in all other respects, we affirm the denial of PCRA relief.

² On February 25, 2003, Appellant was sentenced, in federal court, to serve a term of 100 months in prison for firearms violations and for making false statements in connection with firearm purchases. *See United States v. Comrie*, 136 F. App’x 883 (6th Cir. 2005). According to Appellant, he was scheduled “to be released from [f]ederal

[c]ustody in January 2012.” Motion for Status Conference, 4/27/11, at Exhibit B.

Commonwealth v. Comrie, No. 1232 WDA 2011, unpublished memorandum at 1-6 (Pa. Super. filed May 31, 2012) (n.3 and n.4 omitted) (“***Comrie I***”).

As noted above, on January 3, 2012, Appellant filed the petition for writ of *habeas corpus* that we have deemed as underlying this appeal. First, the court determined that the Appellant’s petition was an untimely PCRA. Then, recognizing that ***Comrie I*** was pending before this Court, the trial court dismissed Appellant’s petition with reliance on ***Commonwealth v. Lark***, 746 A.2d 585 (Pa. 2000), concluding that it would be improper to entertain a subsequent PCRA petition while a prior petition is still pending. In fact, ***Comrie I*** was not filed until May 31, 2012, and we, therefore, must agree that Appellant’s petition was correctly dismissed by the trial court. ***See also Commonwealth v. Davis***, 816 A.2d 1129, 1134 (Pa. Super. 2003) (quoting ***Lark***, 746 A.2d at 588, and stating “[W]hen an appellant’s PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review.”).

With regard to the treatment of Appellant’s petition for writ of *habeas corpus* as a request for relief pursuant to the PCRA, we rely on

Commonwealth v. Kutnyak, 781 A.2d 1259 (Pa. Super. 2001), which states that:

[T]he PCRA is the exclusive vehicle for obtaining post-conviction collateral relief. ***Commonwealth v. Bronshtein***, 561 Pa. 611, 614 n.3, 752 A.2d 868, 869-70 n.3 (2000). This is true regardless of the manner in which the petition is titled. ***Commonwealth v. Hutchins***, 760 A.2d 50, 52 n.1 (Pa. Super. 2000). Indeed, the PCRA statute specifically provides for such treatment:

The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including *habeas corpus* and *coram nobis*.

42 Pa.C.S.A. § 9542. Simply because the merits of the PCRA petition cannot be considered due to previous litigation, waiver, or an untimely filing, there is no alternative basis for relief outside the framework of the PCRA. ***See generally Commonwealth v Fahy***, 558 Pa. 313, 332, 737 A.2d 214, 223-224 (1999) (citing ***Commonwealth v Chester***, 557 Pa. 358, 733 A.2d 1242 (1999)).

Id. at 1261.

As to the timeliness of Appellant's petition, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence is final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, as set forth at 42 Pa.C.S. § 9545(b)(1)(i), (ii), and (iii), is met. ***See Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S. § 9545. Further, a petition alleging an exception must be filed within 60 days of the time the claim could first have been presented. ***See***

42 Pa.C.S. § 9545(b)(2). To invoke an exception, a petitioner must plead it explicitly and satisfy the appropriate burden of proof. ***Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999). Additionally, the timeliness requirement is mandatory and jurisdictional in nature; a court may not ignore it to reach the merits of the petition. ***Commonwealth v. Murray***, 753 A.2d 201, 203 (Pa. 2000).

The decision in ***Comrie I***, with reliance on Pa.R.A.P. 903(a) and 1 Pa.C.S. § 1908, calculated that “Appellant’s judgment of sentence became final on January 17, 2005, - which was 30 days after the trial court sentenced Appellant and the time for filing a direct appeal to this Court expired.” ***Comrie I***, at 3. Since Appellant’s present petition was not filed until January 3, 2012, it is patently untimely. Moreover, our review reveals that Appellant has not pled any of the time of filing exceptions as is required to invoke them and to preserve an otherwise untimely petition.

Also, because Appellant appears to be arguing that his sentence is illegal, we further quote from the ***Comrie I*** decision, wherein we explained that:

[I]n [***Commonwealth v. Jackson***, 30 A.3d 516 (Pa. Super. 2011)], the petitioner filed an untimely PCRA petition and claimed that the trial court imposed a manifestly illegal sentence. We held that, since the “[PCRA] petition was patently untimely, [] the PCRA court did not have jurisdiction under [42 Pa.C.S.A. §] 9545 to consider [the petitioner’s illegal sentence] claim.” ***Jackson***, 30 A.3d at 521-522. The ***Jackson*** Court reasoned that, although an illegal sentence claim cannot be waived, a court must first have jurisdiction – or authority – to consider the claim in the first instance. ***Id.*** at 522. Once the

PCRA's statutory deadline has passed, however, "section 9545 ... acts to divest a court of [subject matter] jurisdiction" over the claims. *Id.* at 523.

Id. at 8. Likewise, in the context of this instant appeal, we recognize that neither the trial court nor this Court has jurisdiction to address Appellant's sentencing claim.

Accordingly, we conclude that Appellant's petition for writ of *habeas corpus* is subsumed within the PCRA, that it was untimely in that more than one year had elapsed since Appellant's judgment of sentence became final, that no exception applies, and that the prior PCRA proceeding was still pending at the time Appellant filed his latest petition. Therefore, we are compelled to affirm the trial court's dismissal of Appellant's petition for writ of *habeas corpus*.

Order affirmed.