

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ANGEL PEREZ,

Appellant

No. 569 EDA 2012

Appeal from the Order Entered January 30, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0921871-1983

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY BENDER, J.

FILED MAY 06, 2013

Appellant, Angel Perez, appeals *pro se* from the trial court's January 30, 2012 order denying his *pro se* "Petition For Modification of Sentence Pursuant Title [*sic*] 61 Pa.C.S.A. § 81." We affirm.

Appellant filed the above-stated petition on January 20, 2012.¹ Therein, he discussed various medical diagnoses and health issues that ostensibly began in 1995 and have continued until the present time. Appellant characterized these health issues as "life threatening conditions" and argued that he was receiving inadequate care in prison. Petition For

¹ While not necessary to dispose of this appeal, we note that Appellant was convicted in 1988, following a jury trial, of aggravated assault, criminal conspiracy, possessing an instrument of crime, and three counts of robbery. He was sentenced to an aggregate term of 11 to 32 years' incarceration imposed to run consecutively to a federal sentence of incarceration he was serving in an unrelated drug case.

Modification of Sentence Pursuant Title [*sic*] 61 Pa.C.S.A. § 81, 1/20/12, at 2 (pages unnumbered). Appellant asked the trial court to modify his term of imprisonment to “a sentence of 15 years [*sic*] probationary supervision concurrent to his federal sentence.” ***Id.*** at 3. Appellant relied on 61 Pa.C.S. § 81 as providing authority for the court to amend his sentence in this manner. ***Id.***

On January 30, 2012, the court issued an order denying Appellant’s petition. In its subsequent Pa.R.A.P. 1925(a) opinion, the trial court first noted that in August of 2009, 61 Pa.C.S. § 81 was replaced by 42 Pa.C.S. § 9777. The court concluded that Appellant’s petition, filed in 2012, was subject to the requirements of section 9777, which states, in relevant part:

(a) Inmates committed to custody of department.--If an inmate is committed to the custody of the department, the department, the inmate or a person to whom the court grants standing to act on behalf of the inmate may petition the sentencing court to temporarily defer service of the sentence of confinement and temporarily remove the inmate committed to the custody of the department, or other facility, for placement in a hospital, long-term care nursing facility or hospice care location. The following shall apply:

(1) The sentencing court may approve the petitioner's request to temporarily defer service of the sentence of confinement and place the inmate in a hospital or long-term care nursing facility under electronic monitoring by the department upon clear and convincing proof that all of the following apply:

(i) The medical needs of the inmate can be more appropriately addressed in the hospital or long-term care nursing facility.

(ii) The hospital or long-term care nursing facility requested by the petitioner has agreed to accept the

placement of the inmate and to provide necessary medical care.

(iii) The inmate is seriously ill and is expected by a treating physician to not live for more than one year.

(iv) There are no writs filed or detainers lodged against the inmate and the inmate is not subject to any court order requiring the inmate's presence.

(v) The placement in the hospital or long-term care nursing facility does not pose an undue risk of escape or danger to the community. In making this determination, the sentencing court shall consider the inmate's institutional conduct record, whether the inmate was ever convicted of a crime of violence, the length of time that the inmate has been imprisoned and any other factors the sentencing court deems relevant.

(vi) The hospital or long-term care nursing facility has agreed to notify the department and the court of any material changes in the health status of the inmate, the nature of the care provided or other information required by the department.

(vii) Each agency representing the Commonwealth at a proceeding which resulted in an order committing or detaining the inmate, the State or local correctional facility housing the inmate and any registered crime victim have been given notice and an opportunity to be heard on the petition.

42 Pa.C.S. § 9777(a)(1)(i)-(vii).

After assessing Appellant's petition pursuant to this provision, the trial court concluded that Appellant "failed to state a *prima facie* claim for relief." Trial Court Opinion (T.C.O.), 3/28/12, at 3. Specifically, the court emphasized that Appellant failed to "identify ... a hospital or long-term care nursing facility which has agreed to accept his placement, ... nor has he

provided the opinion of a treating physician that he is not expected to live more than one year. Indeed, he has provided no verifiable medical documentation of his alleged serious condition.” **Id.** (citations omitted). Thus, based on Appellant’s failure to provide “clear and convincing evidence that he has met the requirements of section 9777(a)(1),” the court denied him relief. **Id.**

Appellant filed a timely notice of appeal and, herein, he sets forth sixteen issues for our review. We decline to reproduce Appellant’s issues *verbatim*, as they are confusing, at best. The lengthy and rambling argument section of Appellant’s brief is also nearly incomprehensible. From what we can ascertain, a large portion of Appellant’s argument is devoted to challenging the court’s denial of motions/petitions he filed as long ago as 2006, which we are without jurisdiction to consider. **See** Pa.R.A.P. 903(a) (mandating that “notice of appeal ... shall be filed within 30 days after the entry of the order from which the appeal is taken”); **Brown v. Brown**, 641 A.2d 610, 611 (Pa. Super. 1994) (stating “an untimely appeal divests this [C]ourt of jurisdiction”). Additionally, Appellant asserts ineffective assistance of counsel claims, referring to various attorneys who represented him at trial, on direct appeal, and in subsequent petitions for relief filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. However, those claims were not presented in the petition that is at issue in the instant appeal and, thus, they are waived. Pa.R.A.P. 302(a) (“Issues not

raised in the lower court are waived and cannot be raised for the first time on appeal.”).

It does appear, however, that in certain portions of Appellant’s argument section, he challenges the court’s denial of his “Petition For Modification of Sentence Pursuant Title [sic] 61 Pa.C.S.A. § 81.” For instance, Appellant sets forth his medical ailments and states that he is seeking “a probationary sentence of 15 years” so that he may obtain necessary treatment. Appellant’s Brief at 25 (unnumbered pages). However, after carefully reviewing Appellant’s petition, we agree with the trial court that he has failed to provide “clear and convincing proof” that all of the seven elements set forth in section 9777(a)(1) are satisfied. In addition, the relief he seeks, *i.e.* a probationary sentence, is not an available remedy under that provision. Instead, a court may only “place the inmate in a hospital or long-term care nursing facility.” 42 Pa.C.S. § 9777(a)(1)(i)-(vii). Accordingly, we conclude that the court did not err in denying Appellant’s petition.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambetta", written over a horizontal line.

Prothonotary

Date: 5/6/2013

