

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

TYRONE CABINESS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 65 EDA 2012

Appeal from the Order Entered November 30, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0004641-2008
CP-51-CR-0016586-2008

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY LAZARUS, J.

Filed: January 7, 2013

Tyrone Cabiness appeals from the order entered in the Court of Common Pleas of Philadelphia County denying his Motion to Correct Illegal Sentence *Nunc Pro Tunc*. For the reasons that follow, we affirm.

On July 24, 2009, Cabiness pled guilty to carjacking in the U.S. District Court for the Eastern District of Pennsylvania based on an incident that occurred in West Philadelphia on October 26, 2008. On October 30, 2009, the federal district court sentenced him to a term of 141 months' imprisonment plus five years of supervised release.

Fifteen months prior to the carjacking, on June 20, 2007, Cabiness robbed two patrons of a gas station in West Philadelphia. He was arrested and charged with two counts of robbery and violation of the Uniform Firearms Act. On October 26, 2008, shortly after committing the carjacking

that led to federal charges, Cabiness robbed two men in West Philadelphia. He was arrested, and charged with two counts of robbery and possessing an instrument of crime.

On March 5, 2010, Cabiness entered into negotiated guilty pleas before the Honorable Gwendolyn Bright of the Court of Common Pleas, and was sentenced to concurrent terms of 8 to 20 years' imprisonment for the robberies, plus a cumulative 10 years' probation on the weapons charges. The court ordered the sentences to be served concurrently with any other sentence Cabiness was serving.

Although Cabiness and his counsel assumed that he would be able to serve his state and federal sentences concurrently, the Federal Bureau of Prisons disagreed. It determined that Cabiness would begin his federal sentence upon completion of his state sentence.

On February 4, 2011, Cabiness filed a motion for recommendation of concurrent designation in federal court. On March 28, 2011, the Honorable Stewart Dalzell denied the motion, noting, *inter alia*, that the offenses for which Cabiness was sentenced in state court were clearly distinct from the offenses for which he was sentenced in federal court.

Having been denied relief in federal court, Cabiness filed a Motion to Correct Illegal Sentence *Nunc Pro Tunc* on August 4, 2011. Following oral argument on November 30, 2011, Judge Bright denied the motion. Cabiness filed a timely notice of appeal on December 2, 2011, and on January 3, 2012, he filed a statement of matters complained of on appeal pursuant to

Pa.R.A.P. 1925(b). On April 17, 2012, the court issued its Rule 1925(a) opinion in which it explained that the sentence imposed was legal.

On appeal, Cabiness raises the following issue for our review.

Did not the [trial] court err in failing to correct an illegal sentence, where [Cabiness'] sentence, imposed after a negotiated guilty plea and accepted by the [trial] court, required him to serve an 8 to 20 year (96 to 240 months) sentence concurrently with the 141 month sentence he is serving in the federal system for similar offenses, but where the Federal Bureau of Prisons has calculated his federal sentence of 141 months must be served consecutively to his later imposed state sentence, effectively forcing [Cabiness] to serve a combined federal and Pennsylvania minimum sentence of at least 237 months inasmuch as the intentions of the [trial] court, the defense attorney, the prosecutor and [Cabiness] regarding the negotiated guilty plea and sentencing have been thwarted, as it is incapable of being put into effect, and where said sentence is illegal and should have been corrected to conform as closely as possible to the original intent of the parties?

Brief of Appellant, at 3.

In *Commonwealth v. Voss*, 838 A.2d 795 (Pa. Super. 2003), an appellant sought review in this Court of a trial court order denying his "Motion to Correct Illegal Sentence." We held that challenges to the legality of a sentence must be raised in a petition filed pursuant to the Post-Conviction Relief Act ("PCRA").¹ Section 9542 of the PCRA "provides for an action by which . . . persons serving illegal sentences may obtain collateral relief." It further provides that it is the "sole means of obtaining collateral

¹ 42 Pa.C.S. §§ 9541-9546.

relief.” 42 Pa.C.S. § 9542. Following our precedent in **Voss**, the trial court should have treated Cabiness’ motion as a PCRA petition.

Here, the trial court entered its judgment of sentence on March 5, 2009. Cabiness did not file a direct appeal, and therefore his judgment of sentence became final on April 4, 2009.² He filed his Motion to Correct Illegal Sentence *Nunc Pro Tunc*, which we treat as a PCRA petition, on August 4, 2011.

The PCRA requires that all petitions be filed within one year of the date the judgment of sentence became final unless the petitioner alleges and proves that the failure to raise a timely claim (1) was the result of interference by government officials; (2) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by reasonable diligence; or (3) the right asserted is a constitutional right that has been recognized by the U.S. Supreme Court or the Supreme Court of Pennsylvania after the one-year time period, and has been held to apply retroactively. 42 Pa.C.S. § 9545(b)(1). Cabiness has

² A judgment becomes 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 the review.” 42 Pa.C.S. § 9545(b)(3).

neither pled nor proved that any of the exceptions to the time bar of the PCRA apply. *Id.*³

Because Cabiness' Motion was an untimely PCRA petition, he is not entitled to relief.

Order affirmed.⁴ Motion to correct omissions in the record pursuant to Pa.R.A.P. 1926 granted.⁵

³ Even if we viewed the federal district court's order denying Cabiness' motion for recommendation of concurrent designation as a "fact . . . unknown to the petitioner [that] could not have been ascertained by the exercise of due diligence," 42 Pa.C.S. § 9545(b)(1)(ii), we still would not be able to grant relief. The federal district court's order is dated March 28, 2011. Cabiness filed his "Motion to Correct Illegal Sentence Nunc *Pro Tunc*" on August 4, 2011. Any petition invoking an exception to the PCRA time bar "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2).

⁴ This Court may affirm the trial court's decision "on any ground, even one not considered by that court." ***Commonwealth v. Lauro***, 819 A.2d 100, 109 n.8 (Pa. Super. 2003).

⁵ On October 12, 2012, Cabiness filed a motion to correct the record, seeking to include the order of the United States District Court for the Eastern District of Pennsylvania, filed March 28, 2011, denying his motion for designation of concurrent designation. ***United States v. Cabiness***, No. 09-200 (E.D.Pa. Mar. 28, 2011).