

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MICHAEL LEE WEIMER,	:	
	:	
Appellant	:	No. 683 EDA 2013

Appeal from the PCRA Order January 30, 2013  
 In the Court of Common Pleas of Lehigh County  
 Criminal Division No(s): CP-39-CR-0001309-1993,  
 CP-39-CR-0001310-1993, CP-39-CR-0001311-1993,  
 CP-39-CR-0002914-1993,CP-39-CR-0003024-1993

BEFORE: BOWES, PANELLA, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 04, 2013**

*Pro se* Appellant, Michael Lee Weimer, appeals from the order entered in the Lehigh County Court of Common Pleas, dismissing his serial Post Conviction Relief Act<sup>1</sup> (“PCRA”) petition.<sup>2</sup> The court reasoned that Appellant’s claim, that he should have been released from imprisonment at

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 42 Pa.C.S. §§ 9541-9546.

<sup>2</sup> Appellant appealed from the court’s January 24, 2013 order dismissing his PCRA petition. For reasons discussed *infra*, we have amended the caption to indicate the appeal is taken from the court’s subsequent, January 30, 2013 order, which directed that Appellant’s petition “remain[ ] dismissed” following consideration of his *pro se* response which had been filed in the interim. **See** Order, 1/30/13 (capitalization removed).

age thirty-nine, was a request for relief from a parole board decision, and such a claim is not cognizable under the PCRA. We agree and affirm.

We need only set forth an abbreviated summary of the procedural history of this matter. In April of 1994, Appellant pleaded guilty to third-degree murder<sup>3</sup> and other offenses. On May 31, 1994, the trial court imposed an aggregate sentence of eighteen and one half to forty-eight years' imprisonment.<sup>4</sup> At this point we note that the sentencing transcript does not include any statement by the court concerning Appellant's release date or his age at release from prison. The court subsequently denied Appellant's post-sentence motion, and Appellant did not take a direct appeal.

Seven years later, Appellant filed a first PCRA petition on September 19, 2001. The PCRA court dismissed it as untimely-filed and this Court affirmed on appeal.<sup>5</sup> The record indicates that Appellant filed a second PCRA

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<sup>3</sup> 18 Pa.C.S. § 2502(c).

<sup>4</sup> The court imposed: 10 to 20 years' imprisonment for murder of the third degree; a consecutive 5 to 10 years for robbery; a consecutive 2½ to 5 years for theft by unlawful taking; and a consecutive 1 to 3 years for forgery. N.T. Sentencing H'rg, 5/31/94, at 66-68. The court also imposed the following sentences, all to run concurrently with the above: 1 to 3 years for unauthorized use of a computer; 1 to 3 years for another count of theft by unlawful taking; 1 to 3 years for receiving stolen property. *Id.*

<sup>5</sup> ***Commonwealth v. Weimer***, 979 EDA 2002 (unpublished memorandum) (Pa. Super. Sept. 13, 2002). The Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Weimer***, 834 MAL 2002 (Pa. Dec. 19, 2002).

petition in 2003, which was denied, and a motion to correct illegal sentence in 2004, which was likewise denied.<sup>6</sup>

On January 8, 2013, Appellant filed the instant *pro se* PCRA petition, his fourth. On the pre-printed form, Appellant checked boxes alleging he was eligible for relief because of ineffective assistance of counsel and an unlawfully induced guilty plea. The “facts” he presented in support are that his attorney, the Commonwealth, and the trial court “accept[ed] a plea bargain with the full understanding that [he] would be released” upon completion of his minimum sentence.<sup>7</sup> Appellant’s Mot. for Post Conviction Collateral Relief, 1/8/13, at 3. Appellant also averred that at sentencing, the trial court stated, “When you are released, you will be 39 years old, a relatively young man with a fresh start at life.” *Id.* at 7-a.

On January 16, 2013, the PCRA court issued Pa.R.Crim.P. 907(1) notice of intent to dismiss Appellant’s petition, reasoning that his request was for relief from the Board of Probation and Parole’s December 4, 2012 decision, and could not be pursued in a PCRA petition. The court then entered an order on January 24th, dismissing the petition.

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<sup>6</sup> We would construe a motion to correct an illegal sentence as a PCRA petition. **See Commonwealth v. Taylor**, 65 A.3d 462, 466 (Pa. Super. 2013). Appellant took a *pro se* appeal from the denial of this motion, but this Court dismissed the appeal for failure to file a brief. **Commonwealth v. Weimer**, 1941 EDA 2004 (*per curiam* order) (Pa. Super. 10/28/04).

<sup>7</sup> Appellant also attached a two-page typed document setting forth the same argument and some case authority

On January 30, 2013, Appellant filed a "Rebuttal for Admittance of P.C.R.A.," arguing that contrary to the language in the court's order, his sentence was not consistent with his plea bargain, again alleging "he was advised and informed that he would be released at [thirty-nine] years old and is not currently available to be released until at[ ]least [forty-one] years of age." Appellant's Rebuttal for Admittance of P.C.R.A., 1/30/13, at ¶ 2. On the same day, the court entered a second order acknowledging Appellant's response and ordering that his petition "remain[ ] dismissed for reasons stated in" its prior order. Order, 1/30/13. Appellant filed a *pro se* timely notice of appeal and complied with the court's order to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

Preliminarily, we consider the propriety of the court's first order, of January 24, 2013, dismissing Appellant's petition. The court's January 16, 2013 907(1) notice of intent to dismiss properly provided that Appellant "shall have twenty (20) days to respond to [the] notice." Order, 1/16/13. **See** Pa.R.Crim.P. 907(1) ("The defendant may respond to the proposed dismissal within 20 days of the date of the notice."); **Commonwealth v. Hopper**, 965 A.2d 270, 274 (Pa. Super. 2009) (citing PCRA court's observation that it dismissed defendant's PCRA petition without any 907(1) notice and holding service of any notice of dismissal must occur at least twenty days prior to official dismissal order). **But see Commonwealth v. Williams**, 909 A.2d 383, 384 n.4 (Pa. Super. 2006) (holding that because

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defendant did not raise on appeal, any defect in notice was waived). The court then dismissed the petition on January 24th, before the lapse of twenty days. Appellant nevertheless filed a *pro se* response on January 30th. The court's second order, also filed January 30th, indicated that it considered Appellant's response and ordered that his petition "remain[ ] DISMISSED for" the same reasons in its first order. Order, 1/30/13. Accordingly, we are satisfied that the court properly provided Appellant twenty days to respond to its 907 notice. **See Hopfer**, 965 A.2d at 274. We have amended the caption to indicate that Appellant's appeal lies from the January 30th order, and not the January 24th order.

On appeal, Appellant argues the PCRA court erred in: (1) dismissing his petition without a hearing, holding that he is filing for parole-related administrative relief, and not addressing his argument that the trial judge did not comply with his plea terms; (2) not releasing him from prison when the court stated he would be released at the age of thirty-nine; and (3) not appointing counsel to represent him. Appellant's Brief at 3. We find no relief is due.

We address Appellant's first two claims together—that he should be released based upon a statement made by the court at sentencing, which was also a term of his plea agreement. Appellant alleges that "when the transcripts were released to [him], the promises and statements made by the Judge were missing from the record." Appellant's Brief at 7. We hold no

relief is due.

Pennsylvania Rule of Appellate Procedure 1921 states:

The original papers and exhibits filed in the lower court, paper copies of legal papers filed with the prothonotary by means of electronic filing, **the transcript of proceedings**, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases.

Pa.R.A.P. 1921 (emphasis added). The accompanying note provides:

An appellate court may consider only the facts which have been duly certified in the record on appeal. All involved in the appellate process have a duty to take steps necessary to assure that the appellate court has a complete record on appeal, so that the appellate court has the materials necessary to review the issues raised on appeal. Ultimate responsibility for a complete record rests with the party raising an issue that requires appellate court access to record materials.

Pa.R.A.P. 1921, *note* (citations omitted).

As stated above, a careful review of the sentencing transcript reveals no statement by the trial court, or indeed either party, concerning the date of Appellant's potential release from prison or his age at the time of release. We reject Appellant's bald assertion that the court's purported statements have been redacted from the transcript. We cannot accept Appellant's version of what was said at sentencing in lieu of the sentencing transcript included in the certified record on appeal. **See** Pa.R.A.P. 1921 & *note*.

In light of the foregoing, we agree with the PCRA court, despite Appellant's insistence to the contrary, that what he is requesting is relief from the probation board's denial of release. **See also** Appellant's Mot. for

Post Conviction Collateral Relief at 7-A (“[Appellant] was arbitrarily denied parole by the Parole Board twice, despite being in compliance with all required programming, support of all D.O.C. staff for parole, in addition to a record of positive conduct during time of incarceration.”). This Court has stated:

In construing [42 Pa.C.S § 9542], Pennsylvania Courts have repeatedly held that the PCRA contemplates only challenges to the propriety of a conviction or a sentence. (“The PCRA is not the proper vehicle to seek review of the Board [of Probation and Parole]’s administrative decisions.”)[.]

***Commonwealth v. Masker***, 34 A.3d 841, 843 (Pa. Super. 2011), *appeal denied*, 47 A.3d 846 (Pa. 2012). Accordingly, we likewise agree with the PCRA court that Appellant’s requested relief is not cognizable under the PCRA.<sup>8</sup> ***See id.***

Furthermore, we deny relief on Appellant’s claim that the PCRA court erred in denying his petition without a hearing. Because his claim is not cognizable under the PCRA, a hearing was not appropriate nor required. ***See Commonwealth v. King***, 999 A.2d 598, 601 (Pa. Super. 2010) (stating there is no absolute right to evidentiary hearing on PCRA petition and it is appropriate to deny hearing where PCRA court can determine from record that no genuine issues of material fact exist).

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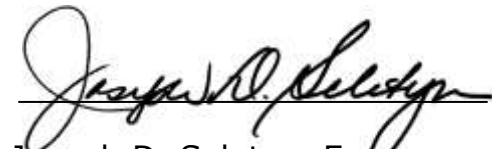
<sup>8</sup> In light of this holding, we need not consider whether Appellant’s petition complied with the PCRA’s timeliness requirements.

Appellant's last issue on appeal is whether the PCRA court erred in not appointing counsel to represent him. Appellant's Brief at 3, 9. We note that although Appellant requested counsel in his PCRA petition, Appellant's Mot. for Post Conviction Collateral Relief at 7, he did not challenge the subsequent lack of appointment of counsel in his *pro se* response to the court's notice of intent to dismiss. Accordingly, this claim is waived. **See *Commonwealth v. Bedell***, 954 A.2d 1209, 1216 (Pa. Super. 2008) (stating claims not raised in PCRA court are waived and cannot be raised for first time on appeal). Furthermore, the automatic right to counsel in collateral appeal generally applies only to first PCRA petitions. ***Commonwealth v. Jackson***, 965 A.2d 280, 283 (Pa. Super. 2009).

For the foregoing reasons, we affirm the order of the court denying Appellant's PCRA petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/4/2013