

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHRISTOPHER EDWARD HARKINS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 734 EDA 2012

Appeal from the PCRA Order entered February 10, 2012
In the Court of Common Pleas of Pike County
Criminal Division at No(s): CP-52-CR-0000142-2009

BEFORE: DONOHUE, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: February 22, 2013

Appellant, Christopher Edward Harkins, appeals from an order entered on February 10, 2012 in the Criminal Division of the Court of Common Pleas of Pike County that denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We vacate the order denying PCRA relief and amend Appellant's March 10, 2010 judgment of sentence to relieve Appellant of the obligation to pay the costs of his incarceration at the Pikes County Correctional Facility. All other provisions of the March 10, 2010 judgment of sentence shall remain undisturbed.

On March 10, 2010, Appellant pled guilty to theft by deception – false impression, 18 Pa.C.S.A. § 3922(a)(1), and unlawful use of a computer, 18 Pa.C.S.A. § 7611. On the same date, the trial court sentenced Appellant to serve 28 months to ten years' incarceration in a state correctional facility.

*Former Justice assigned to the Superior Court.

The trial court designated this sentence to run consecutively to a sentence Appellant was already serving. As part of its sentencing order, the trial court directed Appellant to pay the costs of his incarceration for the period in which he was housed in the Pike County Correctional Facility. On March 19, 2010, Appellant filed post-sentence motions that were denied on March 23, 2010. No appeal was taken.

On March 17, 2011, Appellant timely filed a *pro se* petition for collateral relief. Counsel was appointed and an amended petition was filed on August 31, 2011. The trial court convened a hearing on the amended petition on December 15, 2011. The trial court dismissed the amended petition by order dated February 10, 2012. A timely notice of appeal followed on March 9, 2012. Pursuant to an order of court, Appellant, on April 5, 2012, filed his concise statement of errors complained of on appeal. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on May 7, 2012.

Appellant asks us to consider whether his sentence was illegal and whether trial and appellate counsel should have been deemed ineffective in failing to contest the legality of his sentence insofar as the trial court ordered Appellant to pay the costs of his incarceration at the Pike County Correctional Facility. **See** Appellant's Brief at 4.

Appellant argues that the trial court lacked statutory authority to order Appellant to pay the costs of his incarceration at the Pike County Correctional Facility. Since there was no basis for the sentencing court to

impose such costs, Appellant claims that he is entitled to PCRA relief because the unauthorized imposition of costs of incarceration constituted an illegal sentence. Appellant also maintains that counsel was ineffective in failing to object to the trial court's sentencing order to the extent it directed Appellant to pay incarceration costs at the Pike County facility. Appellant asserts that this claim has arguable merit, that counsel had no reasonable strategic grounds for failing to object to this provision of the sentencing order (either at sentencing, by way of post-sentence motion, or on appeal), and that he was prejudiced by counsel's inaction because he is now obligated to pay costs that he should not owe. For these reasons, Appellant claims he is entitled to relief based upon counsel's ineffectiveness.

We first address Appellant's position that the trial court imposed an illegal sentence when, in the absence of statutory authority, it directed Appellant to pay the costs of his incarceration in Pike County. Because we agree with Appellant that this aspect of the trial court's sentencing order lacked statutory authority, we conclude that Appellant is entitled to relief in the form of an order striking the directive to repay incarceration costs. We do not disturb any other provision of the sentence imposed by the trial court. In light of our disposition of Appellant's illegal sentencing claim, we decline to address Appellant's contention that counsel was ineffective in failing to contest the trial court's sentencing order.

Our standard and scope of review in this case are well-settled. "In reviewing the propriety of an order granting or denying PCRA relief, an

appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error." **Commonwealth v. G.Y.**, 2013 WL 85980, *5 (Pa. Super. 2013). The scope of our review is restricted to "the findings of the PCRA Court and the evidence on the record of the PCRA Court's hearing, viewed in the light most favorable to the prevailing party." **Commonwealth v. Collins**, 888 A.2d 564, 574 (Pa. 2005).

A petitioner is eligible for relief under the PCRA if he pleads and proves, *inter alia*, any of following claims: a constitutional violation, the ineffective assistance of counsel, an unlawfully induced guilty plea, the improper obstruction of the right to appeal, the existence of after-discovered exculpatory evidence, **the imposition of a sentence greater than the lawful maximum**, or a proceeding in a tribunal without jurisdiction. 42 Pa.C.S.A. § 9543(a)(2)(i)-(viii).

Commonwealth v. Price, 876 A.2d 988, 992 (Pa. Super. 2005) (emphasis added).

In Pennsylvania, a sentence is unlawful when the trial court imposes a punishment that exceeds the scope of an applicable statute. **Commonwealth v. Burwell**, 2012 WL 5941979, *1 (Pa. Super. 2012). Thus, a defendant who challenges the court's authority to order restitution raises an issue that implicates the legality of his sentence because restitution may be ordered only where it is expressly authorized by statute. **Id.** A claim that challenges the legality of a sentence is cognizable under the PCRA. **Commonwealth v. Turner**, 2012 WL 6642792, *2 (Pa. Super. 2012).

Like restitution, a court may not impose costs upon an offender unless it enjoys statutory authority to do so. *Commonwealth v. Houck*, 335 A.2d 389, 391 (Pa. Super 1975); *Commonwealth v. Williams*, 909 A.2d 419, 420 (Pa. Cmwlth. 2006) (“Costs must not be assessed except as authorized by law[.]”). Although we have been unable to locate appellate precedent which is precisely on point, we are satisfied that Appellant’s challenge to the court’s authority to impose costs of incarceration, in the manner that occurred in this case, raises a claim that implicates the legality of Appellant’s sentence and, therefore, is cognizable under the PCRA.

In this case, the trial court relied upon 42 Pa.C.S.A. § 9728 as the source of its authority to impose costs of incarceration upon Appellant. In relevant part, § 9728 states:

§ 9728. Collection of restitution, reparation, fees, costs, fines and penalties

* * *

g) Costs, etc.--Any sheriff’s costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

42 Pa.C.S.A. § 9728(g). Section 9728(g) refers generally to administrative costs and costs associated with prosecution. It does not mention

correctional facilities and does not refer to costs associated with incarceration. Thus, under a plain reading of § 9728(g), the trial court lacked statutory authority to direct Appellant to pay the costs of his incarceration at the Pike County Correctional Facility. In the absence of statutory authority, the order to pay costs of incarceration constituted an illegal sentence. Accordingly, we vacate that aspect of the trial court's March 10, 2010 sentencing order that imposed costs of incarceration at the Pike County Correctional Facility upon Appellant. All other terms of the trial court's March 10, 2010 sentencing order shall remain undisturbed.

Order vacated. Trial court's March 10, 2010 judgment of sentence amended to relieve Appellant of obligation to pay costs of incarceration at Pike County Correctional Facility. All other provisions of March 10, 2010 judgment of sentence shall remain undisturbed. Jurisdiction relinquished.