NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RASHEED R. MYERS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 831 WDA 2012

Appeal from the PCRA Order May 1, 2012
In the Court of Common Pleas of Blair County
Criminal Division at No(s): CP-07-CR-0002759-2002

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.: Filed: January 29, 2013

Rasheed R. Myers appeals from the order entered by the PCRA court denying his serial petition for post-conviction relief as untimely. We affirm.

This Court has previously outlined the background of this matter as follows.

> On July 14, 2003, Myers entered a negotiated guilty plea to twelve of the fifty-one drug-related counts against him, specifically, eight counts of possession with intent to deliver a controlled substance, 35 P.S. § 780-113(a)(30); and one count each of criminal conspiracy to commit possession with intent to deliver a controlled substance, 18 Pa.C.S. § 903, 35 P.S. § 780-113(a)(30); dealing in proceeds of unlawful activity, 18 Pa.C.S. § 5111(a)(1); criminal use of a communication facility, 18 Pa.C.S. § 7512(a); and corrupt organizations, 18 Pa.C.S. § 911(b)(3).
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> The terms of the guilty plea provided:
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> Plea guilty to 12 instead of 51 counts; defendant to testify truthfully and cooperate against all co-defendants excluding Marguette Myers, in any forum

> including grand jury; in exchange Cmwlth at time of sentencing will request 20 to 40 years imprisonment @ state correctional facility; sentence to run concurrent w/ all current county offenses; Defendant, at time of sentencing, will through his counsel, be permitted to argue for a lesser sentence based upon cooperation; Defendant and Cmwlth agree that the amount of heroin represented by each count is in the range of 10-50 grams, and the amount of cocaine represented by the conspiracy count is 4+ ounces. Commonwealth agrees to waive mandatories and defendant agrees that Court may go outside sentencing guidelines to reach the sentence contemplated by this plea agreement.

Written Guilty Plea Colloquy, 7/14/03, at 9.

Moreover, the trial court issued an order dated July 14, 2003, and entered on July 21, 2003, setting forth the guilty plea agreement which the trial court accepted, while noting that the defense was not restricted from arguing for a reduced sentence. Trial Court Order, 7/21/03, at 3. Further, the order provided that sentencing was deferred and would be rescheduled in ninety days. After Myers provided two statements to the Commonwealth on August 14, 2003, the trial court scheduled sentencing to occur on August 21, 2003.

On August 18, 2003, Myers filed a Motion to Continue Sentencing, which the Commonwealth did not oppose. The motion specifically provided that Myers waived his right to be sentenced within ninety days of the entry of the guilty plea. ***See*** Pa.R.Crim.P. 704(A). At the commencement of the sentencing hearing on August 21, 2003, Myers's plea counsel argued that the continuance should be granted, but the court denied the motion. The trial court sentenced Myers to serve an aggregate sentence of twenty to forty years' imprisonment, and restitution in the amount of $1,000; all other charges were *nolle prossed* and dismissed. Myers did not file a direct appeal.

On April 26, 2004, Myers filed a PCRA petition. The PCRA court appointed counsel to represent Myers, and counsel filed the amended PCRA petition on April 20, 2005. The PCRA court held an evidentiary hearing on the petition on April 26, 2005, and then directed the parties to file briefs. Subsequently, in the

> order entered on May 12, 2006, the PCRA court denied Myers's petition.

Commonwealth v. Myers, 927 A.2d 655 (Pa.Super. 2007) (unpublished memorandum, 1-3). Appellant appealed and this Court affirmed. ***Id***. Appellant did not seek review with our Supreme Court.

Thereafter, on July 30, 2010, Appellant sought federal *habeas* relief. Therein, Appellant, for the first time in court filings, alleged that he was sentenced at two counts in the present case for crimes for which he had earlier been convicted and sentenced.[1] The federal court did not reach the merits of the petition and denied it as untimely. Appellant then filed the underlying PCRA petition on November 30, 2011, raising the identical double jeopardy claim leveled in his federal *habeas* litigation. According to Appellant, he timely filed this serial petition based on the governmental interference and newly-discovered fact exceptions to the one-year PCRA time-bar.

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[1] Appellant pled guilty to felony possession with intent to deliver and a misdemeanor possession charge and was sentenced to nine to eighteen months incarceration for actions occurring on January 28, 2000 and May 3, 2000, in an earlier case. In this matter, counts one and two of Appellant's criminal information were for PWID of heroin and cocaine for the period between December 1999 and May 2000. Appellant did not allege a violation of 18 Pa.C.S. § 110, relative to compulsory joinder. ***Compare Commonwealth v. George***, 38 A.3d 893 (Pa.Super. 2012) and ***Commonwealth v. Reid***, 35 A.3d 773 (Pa.Super. 2012), *appeal granted*, 55 A.3d 1049 (Pa. 2012) (discussing compulsory joinder of prosecutions).

Despite not being entitled to counsel, ***see Commonwealth v. Kubis***, 808 A.2d 196, 200 (Pa.Super. 2002), the court appointed counsel to represent Appellant and directed him to file an amended petition within sixty days. Although not contained within the record, counsel apparently wrote a letter to the court indicating that he would not submit an amended petition[2] and no petition or request for a hearing is contained in the record.[3] The

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[2] The Commonwealth made this representation in its motion opposing Appellant's PCRA petition as untimely.

[3] We disapprove of counsel's failure to file either an amended petition or a ***Turner/Finley*** no-merit letter. While defendants are not entitled to counsel when they are proceeding on a serial petition, ***Commonwealth v. Kubis***, 808 A.2d 196, 200 (Pa.Super. 2002), once counsel is appointed, he or she must perform in a meaningful manner, which includes amending inartfully drafted petitions. ***See Commonwealth v. Sangricco****,* 415 A.2d 65*,* 68-69 (1980); ***Commonwealth v. Ollie***, 450 A.2d 1026 (Pa.Super. 1982).

Indeed, were this a first time petition, we note that the failure to file an amended petition or present a brief arguing on behalf of the defendant ordinarily constructively denies a petitioner his right to a counseled PCRA proceeding. ***See Commonwealth v. Powell***, 787 A.2d 1017, 1019 (Pa.Super. 2001); ***Commonwealth v. Priovolos***, 746 A.2d 621, 625 (Pa.Super. 2000); ***Commonwealth v. Davis***, 526 A.2d 440 (Pa.Super. 1987) (failure to file amended petition or supporting brief constructively denied petitioner right to PCHA counsel even though counsel did appear before court to make argument); ***see also Sangricco****,* ***supra****;* ***Commonwealth v. Tedford****,* 781 A.2d 1167, 1171 (Pa. 2001) ("the PCRA court erred by dismissing Appellant's *pro se* PCRA Petition rather than directing Appellant to file an amended petition with legal assistance, as Pennsylvania Rule of Criminal Procedure 1505(b) clearly mandates."); ***Commonwealth v. Burkett***, 5 A.3d 1260, 1277 (Pa.Super. 2010) (collecting cases). Since this is not a first time petition and counsel adequately represented Appellant at the PCRA evidentiary hearing herein, counsel was not *per se* ineffective in neglecting to file an amended petition. ***See Commonwealth v. Murray***, 836 A.2d 956, 961 (Pa.Super. 2003),
(Footnote Continued Next Page)

Commonwealth responded by filing a motion to dismiss based on the untimeliness of the petition. The court scheduled an evidentiary hearing wherein counsel appeared and Appellant testified that the delay in filing the current petition was caused by the Blair County Clerk of Court's failure to turn over accurate docketing information. The PCRA court issued an order and opinion finding that Appellant did not demonstrate that either the governmental interference or newly-discovered fact exception was applicable. This timely appeal ensued. The court directed Appellant to comply with Pa.R.A.P. 1925(b). Appellant timely filed and served his Pa.R.A.P. 1925(b) statement. The matter is now ready for our review. Appellant's sole issue is "[w]hether the Trial Court erred in dismissing the Appellant's current PCRA Petition as being untimely filed?" Appellant's brief at 2.

The filing mandates of the PCRA are jurisdictional in nature and are strictly construed. ***Commonwealth v. Stokes***, 959 A.2d 306, 309 (Pa. 2008). The question of whether a petition is timely raises a question of law. ***See Commonwealth v. Fahy***, 959 A.2d 312, 316 (Pa. 2008). Where the

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reversed on other grounds by ***Commonwealth v. Robinson***, 970 A.2d 455 (Pa.Super. 2009) (*en banc*) (remand unnecessary where counsel did not file an amended petition but advocated on behalf of client at evidentiary hearing). Nonetheless, we caution the PCRA court against dismissal of a petition after the appointment of counsel absent the filing of either a counseled amended petition, brief, or memorandum of law.

petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary. ***Commonwealth v. Colavita***, 993 A.2d 874, 886 (Pa. 2010). An untimely petition renders this Court without jurisdiction to afford relief. ***Commonwealth v. Gandy***, 38 A.3d 899 (Pa.Super. 2012). A petition for relief under the PCRA must be filed within one year of the date the PCRA petitioner's judgment of sentence becomes final unless the petitioner alleges and proves that an exception to the one-year time-bar is met. 42 Pa.C.S. § 9545.

Appellant contends that the Blair County Clerk of Courts office's failure to provide him with accurate docketing information was governmental interference with his ability to present his claim as well as a newly-discovered fact. He asserts that ***Commonwealth v. Blackwell***, 936 A.2d 497 (Pa.Super. 2007), supports his timeliness exception position. In ***Blackwell***, this Court found both the governmental interference and newly-discovered fact exception rendered the defendant's serial petition timely.

Therein, Blackwell's first PCRA reinstated his direct appeal rights. Following affirmance of his judgment of sentence, he filed another PCRA petition, which was properly treated as the equivalent of a first time petition. ***See Commonwealth v. Figueroa***, 29 A.3d 1177 (Pa.Super. 2011). Counsel, however, never appeared for any of three scheduled evidentiary hearings and the court issued a notice of intent to dismiss. Blackwell filed a *pro se* response, although ordinarily defendants are not entitled to hybrid

representation. ***Commonwealth v. Jette***, 23 A.3d 1032 (Pa. 2011). The court then erroneously indicated that counsel filed a ***Turner/Finley*** no-merit letter and had withdrawn and dismissed Blackwell's petition. Blackwell did not appeal, but instead filed a serial petition. The court issued a notice of dismissal and Blackwell replied, asking that his newest petition be withdrawn and his PCRA appellate rights be reinstated because the court interfered with his ability to proceed by incorrectly informing him that he no longer had counsel.

We found that under these unusual circumstances, Blackwell's *pro se* response should have been considered a petition to withdraw under Pa.R.Crim.P. 905, and a new petition alleging the governmental timeliness exception. ***Compare Commonwealth v. Rykard***, 55 A.3d 1177 (Pa.Super. 2012) (collecting cases and holding that a response to a notice of intent to dismiss, where there is no petition to withdraw, is not a serial petition but an objection to dismissal). We then continued that counsel's abandonment and the court's erroneous notification that counsel had withdrawn met the newly-discovered fact and governmental interference timeliness exceptions.

The applicable statutory provision relative to governmental interference provides that a petition may be filed after the one-year jurisdictional time-bar if "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the

Constitution or laws of the United States[.]" 42 Pa.C.S. § 9545(b)(1)(i). The newly-discovered fact exception states that a petition may be timely if "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" 42 Pa.C.S. § 9545(b)(1)(ii). In addition, the claim must be presented within sixty days of the date the claim could have been raised. 42 Pa.C.S. § 9545(b)(2).

We find ***Blackwell*** inapposite. Here, Appellant asserted at the PCRA hearing that he informed PCRA counsel during his first PCRA proceeding of this alleged double jeopardy violation. Thus, he knew of the claim in 2005, and the Clerk of Court's purported action had yet to occur. Moreover, Appellant himself was the person sentenced at both cases and therefore had personal knowledge of the purported violation when he pled guilty and was sentenced in this matter. He cannot claim he exercised due diligence in bringing the matter forward in 2011. In addition, Appellant did not request the publicly available docket information until after the one-year time bar elapsed.[4] Finally, Appellant made his underlying double jeopardy allegation in a federal *habeas* petition in 2010, but waited to file this PCRA petition until November 2011, well after the sixty-day time period. The filing of a

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[4] Ordinarily, public information cannot serve as a newly-discovered fact. ***Commonwealth v. Chester***, 895 A.2d 520 (Pa. 2006); ***but see Commonwealth v. Bennett***, 930 A.2d 1264, 1275 (Pa. 2007) (public record must be accessible to defendant).

habeas petition does not toll the PCRA time-bar nor does it prevent the filing of a PCRA petition. ***Commonwealth v. Whitney***, 817 A.2d 473 (Pa. 2003). For all of these reasons, Appellant's timeliness averments are without merit and we affirm.

Order affirmed.