

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KENNETH WINSTON ASHFORD,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1349 MDA 2015

Appeal from the Order Entered June 30, 2015
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0002467-2008

BEFORE: PANELLA, J., MUNDY, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.:

FILED FEBRUARY 02, 2016

Appellant, Kenneth Winston Ashford, appeals from the order entered on June 30, 2015, dismissing his Writ of Mandamus challenging the legality of his sentence. We affirm.

In ***Commonwealth v. Ashford***, No. 1031 MDA 2013, unpublished memorandum at 2 (Pa.Super. filed February 2, 2014), this Court affirmed the PCRA court's order dismissing Appellant's first petition as untimely filed.¹

¹Under 42 Pa.C.S.A. § 9545(b), a petition for relief under the PCRA must be filed within one year of the date on which judgment of sentence becomes final unless the petition alleges, and the petitioner proves, that a statutory exception to the time requirement as set forth in section 9545(b)(1)(i), (ii), or (iii) applies. ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa.Super. 2009). Appellant's judgment of sentence became final on July 23, 2010, when the time for Appellant to file a petition for allowance of appeal in our Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3) (stating, "a judgment becomes final at the conclusion of direct review, (Footnote Continued Next Page)

*Former Justice specially assigned to the Superior Court.

Subsequently, on November 24, 2014, Appellant filed with the lower court a *pro se* "Writ of Mandamus," the sole purpose of which was to challenge the legality of his sentence.² The lower court discerned no merit to the challenge and denied relief in its order of June 30, 2015. This timely appeal followed.³

(Footnote Continued) _____

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["); Pa.R.A.P. 1113(a) (stating, "a petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days after the entry of the order of the Superior Court . . . sought to be reviewed[)"). To meet the statutory one-year deadline, therefore, Appellant had to file his first PCRA petition by July 23, 2011. He, instead, filed a facially untimely petition on March 5, 2012, unsupported by any allegation that a section 9545(b)(1) exception to the one-year time-bar applied. Accordingly, we dismissed Appellant's first PCRA as untimely.

² Appellant is currently serving an aggregate sentence of five and one-half to 11 years' imprisonment on convictions of attempted burglary, 18 Pa.C.S.A. §§ 901(a) (to commit 18 Pa.C.S.A, § 3502(a)), criminal trespass, 18 Pa.C.S.A. 3503(a)(1)(ii), attempted criminal trespass, 18 Pa.C.S.A. 901(a) (to commit 18 Pa.C.S.A. § 3503(a)), possession of an instrument of crime (PIC), 18 Pa.C.S.A. § 907(a), institutional vandalism, 18 Pa.C.S.A. § 3307(a)(3), and criminal mischief, 18 Pa.C.S.A. 3304(a)(2).

³ Filed on August 4, 2015, Appellant's *pro se* notice of appeal to this Court was ostensibly untimely under Pa.R.A.P. 903(a) (notice of appeal must be filed within 30 days of the entry of the order being appealed). Appellant, however, presents evidence establishing that the court mailed the order to him on July 16, 2016. The Pennsylvania Rules of Appellate Procedure provide that, "in computing any period of time under these rules involving the date of entry of an order by a court or other government unit, the day of entry shall be the day the clerk of the court or the office of the government unit mails or delivers copies of the order to the parties." Pa.R.A.P. 108(a)(1). Accordingly, Appellant's notice of appeal is timely.

Initially, we review whether Appellant's self-styled "Writ of Mandamus" was, as a matter of law, in the nature of a second PCRA petition subject to the jurisdictional requirements of section 9545(b). Any petition filed after an appellant's judgment of sentence becomes final should be treated as a PCRA petition where the PCRA could provide for a potential remedy. **See Commonwealth v. Taylor**, 65 A.3d 462, 465-66 (Pa.Super. 2013) (Deeming petition for *habeas corpus* relief from purportedly illegal sentence a PCRA petition because claim challenging legality of sentence is cognizable under PCRA). It is beyond dispute that a challenge to the legality of one's sentence is cognizable under the PCRA. **See Commonwealth v. Beck**, 848 A.2d 987, 989 (Pa.Super. 2004) (recognizing issues concerning legality of sentence are cognizable under PCRA). We, therefore, consider Appellant's writ and its underlying legality of sentence claim under the rubric of the PCRA.

In an appeal from the grant or denial of PCRA relief, "[o]ur standard of review is whether the PCRA court's determination is supported by the record and is free of legal error." **Commonwealth v. Hague**, 840 A.2d 1018, 1019 (Pa.Super. 2003). We note, furthermore, an appellate court may affirm on a basis different than the PCRA court. **Commonwealth v. Davis**, 816 A.2d 1129, 1136 n. 4 (Pa.Super. 2003).

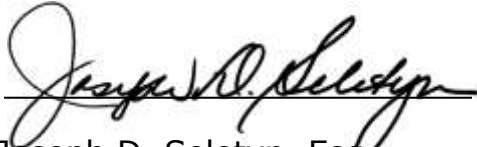
As stated above, the PCRA mandates that any PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1). Appellant filed his

writ/second PCRA petition over four years after judgment of sentence became final. Therefore, Appellant's writ/second PCRA petition is time-barred unless he pled and proved one of the three exceptions to the time limitation set forth in section 9545(b)(1)(i-iii). **See Commonwealth v. Crews**, 863 A.2d 498, 501 (Pa. 2004) (recognizing petitioner's burden to plead in petition and prove that an exception applies). Appellant made no such pleading in his writ/second PCRA petition. Moreover, "[a]lthough legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto." **Commonwealth v. Fahy**, 737 A.2d 214, 223 (Pa. 1999). Because Appellant did not plead or prove any of the exceptions to the PCRA's jurisdictional time bar, we cannot address his legality of sentence challenge.

Therefore, because Appellant's time-barred writ/second PCRA petition has deprived both the lower court and this Court of jurisdiction to address his legality of sentence claim on its merits, **see Commonwealth v. Chester**, 895 A.2d 520, 522 (Pa. 2006) (stating untimely PCRA petition divests appellate and PCRA courts of jurisdiction over petition), we uphold the denial of relief below, albeit on different grounds.

Order is 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: 2/2/2016