NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
JAMES JONES,	:	
	:	
Appellant	:	No. 2676 EDA 2012

Appeal from the PCRA Order August 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0205431-2002

BEFORE: LAZARUS, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 22, 2013**

Pro se Appellant, James Jones, appeals from the order entered in the Philadelphia County Court of Common Pleas dismissing his Post Conviction Relief Act[1] ("PCRA") petition as untimely. We affirm. We also deny Appellant's "Motion to Dismissed [sic] Any Petition Filed by District Attorney."

We state the facts as set forth by a prior panel of this Court:

> On July 26, 2002, Appellant was convicted of robbery, burglary, criminal trespass, theft, receiving stolen property, simple assault, recklessly endangering another person, and criminal mischief. At the sentencing hearing,

* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541–9546.

> the trial court determined that Appellant's robbery and burglary convictions constituted "third strikes" for purposes of 42 Pa.C.S.A. § 9714(a)(2), which requires mandatory minimum sentences be imposed on repeat criminal offenders. Pursuant to the statute, the trial court sentenced Appellant to two concurrent terms of twenty-five to fifty years' imprisonment for the robbery and burglary convictions. No further penalties were imposed on the other convictions.
>
> On December 16, 2003, this Court affirmed the judgment of sentence, rejecting Appellant's claim that the evidence was insufficient to sustain the convictions.[2] On June 29, 2004, the Pennsylvania Supreme Court denied allowance of appeal.
>
> On April 5, 2005, Appellant filed a timely *pro se* [PCRA] petition challenging, *inter alia*, the legality of his sentence. Pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1998) (*en banc*), Appellant's appointed counsel filed a "no merit" letter seeking permission to withdraw from his representation of Appellant. The PCRA Court granted permission to withdraw and dismissed Appellant's petition as frivolous on April 17, 2006.
>
> Appellant appealed the PCRA Court's ruling to this Court. On July 30, 2007, this Court concluded that Appellant had received an illegal sentence.[3] Relying on ***Commonwealth v. McClintic***, 909 A.2d 1241 (Pa. 2006), this Court found that because the robbery and burglary convictions arose out of the same criminal transaction, Appellant should have received the mandatory § 9714 increased sentence for only one of the two convictions, not both. Accordingly, this Court reversed the PCRA Court's order and remanded the matter to the trial court for resentencing.

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[2] ***Commonwealth v. Jones***, No. 28 EDA 2003 (unpublished memorandum) (Pa. Super. filed Dec. 16, 2003).

[3] ***Commonwealth v. Jones***, No. 1209 EDA 2006 (unpublished memorandum) (Pa. Super. filed Jul. 30, 2007).

> At a new sentencing hearing held on October 24, 2007, the sentencing court imposed the enhanced sentence for the robbery conviction only, and imposed a concurrent sentence of nine to eighteen years' incarceration for the burglary conviction. The court did not impose any penalties for the other convictions.

Commonwealth v. Jones, No. 2875 EDA 2007 (unpublished memorandum at 1–3) (Pa. Super. filed Apr. 1, 2009) (footnote omitted).

Appellant challenged his sentence, and on April 1, 2009, this Court affirmed the judgment of sentence and granted appointed counsel's petition to withdraw pursuant to ***Anders v. California***, 386 U.S. 738 (1967). On September 28, 2009, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal.

Appellant filed a *pro se* PCRA petition on October 28, 2009. The PCRA court dismissed the petition and granted appointed counsel's petition to withdraw pursuant to ***Finley***. On appeal, this Court held that the petition "relate[d] to a judgment of sentence which, for purposes of Appellant's conviction, became final in 2004.[ ]" ***Commonwealth v. Jones***, No. 1634 EDA 2010 (unpublished memorandum at 1) (Pa. Super. filed Feb. 4, 2011) (citing ***Commonwealth v. Dehart***, 730 A.2d 991, 994 n.2 (Pa. Super. 1999)). Thus, this Court held the petition was untimely and affirmed. ***Id.*** at 3.

On April 13, 2012, Appellant filed the instant *pro se* PCRA petition,[4] and on May 21st, he filed an amended petition "requesting reinstatement of his appeal rights." Appellant's Amended PCRA Pet. Requesting Reinstatement of Appeal Rights, 5/21/12. On August 20th, the PCRA court dismissed the petition as untimely. The record reflects that the PCRA court did not issue a Pa.R.Crim.P. 907 notice of its intent to dismiss the petition. Appellant filed a timely notice of appeal on August 27th. The record further reflects that the PCRA court did not order Appellant to file a Pa.R.A.P. 1925(b) statement. Appellant subsequently filed with this Court a "Motion to Dismissed [sic] Any Petition Filed by District Attorney" on February 21, 2013.

Appellant raises the following issue on appeal:

> Was the lower Common [P]leas (PCRA) Court decision a small error[ ] when dismissing the PCRA petition as untimely without reviewing the merits of [Appellant's] claims on April 17, 2012[?]

Appellant's Brief at 5 (some capitalization and punctuation omitted).

Before proceeding to the merits of Appellant's claim, we must examine whether we have jurisdiction to entertain the underlying PCRA petition. ***See Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267–68 (Pa. 2008). "Our

[4] The petition is time-stamped as filed on April 17, 2012. We note the postage cancellation on the attached envelope stated April 13th, and the petition is entered on the docket as filed on April 13th. Under the Prisoner Mailbox Rule, we, like the PCRA court, deem the petition as filed on April 13th. ***See Commonwealth v. Crawford***, 17 A.3d 1279, 1281 (Pa. Super. 2011).

standard of review is whether the PCRA court's order is supported by the evidence of record and free of legal error." ***Commonwealth v. Copenhefer***, 941 A.2d 646, 648 (Pa. 2007). "A PCRA petition, including a second or subsequent one, must normally be filed within one year of the date the judgment becomes final . . . unless one of the exceptions in § 9545(b)(1)(i)–(iii) applies and the petition is filed within 60 days of the date the claim could have been presented." ***Id.*** (citations and footnote omitted). "A judgment becomes final at the conclusion of direct review, including discretionary review, or at the expiration of time for seeking such review." ***Id.*** at 648 n.5.

"It is the petitioner's burden to allege and prove that one of the timeliness exceptions applies." ***Abu-Jamal***, 941 A.2d at 1268. The three timeliness exceptions are:

> (i) 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;
>
> (ii) 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; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i)–(iii).

We must first determine the date Appellant's judgment of sentence became final. This Court has stated:

> We recognized the need to distinguish between first and second petitions for collateral relief in ***Commonwealth v. Lewis***, 718 A.2d 1262 (Pa. Super. 1998). In ***Lewis***, we determined that a seemingly second PCRA petition was, in actuality, a first petition. There, [the] appellant's first petition resulted in granting a direct appeal *nunc pro tunc* and not post-conviction relief *per se.* The first PCRA petition, then, necessarily substituted as a petition for permission to appeal *nunc pro tunc,* and we did not consider it to be a first petition for statute of limitations purposes.

Dehart, 730 A.2d at 994 n.2. In ***Dehart***, the appellant challenged the PCRA court's denial of his first PCRA petition. ***Id.*** at 992. Our Supreme Court remanded for resentencing. ***Id.*** After his resentencing, the appellant again filed a PCRA petition, which was dismissed. ***Id.*** at 992–93. On appeal, this Court held that the PCRA petition was the appellant's second. ***Id.*** at 993–94. Distinguishing ***Lewis***, we stated:

> Here, [the] appellant properly exercised his direct appellate rights. His first PCRA petition was unquestionably a PCRA petition and the relief granted was post-conviction relief *per se.* Moreover, the relief granted in the first PCRA action did not affect the adjudication of guilt, but merely the sentence imposed. Because the purpose of the PCRA is to prevent a fundamentally unfair conviction, and the issue of [the] appellant's conviction was not disturbed on the prior PCRA action, we find that this petition constitutes [the] appellant's second attempt at collateral relief.

Id. at 994 n.2 (citation omitted).

As stated above, this Court previously applied ***Dehart*** and held that Appellant's October 29, 2009, PCRA petition "relate[d] to a judgment of sentence which . . . became final in 2004." ***Jones***, 1634 EDA 2010 at 1. Although he obtained post-conviction relief in the form of resentencing in 2007, "that judgment of sentence [did] not affect the finality of his conviction for purposes of the PCRA." ***See id.*** at 1 n.1 (citing ***Dehart***, 720 A.2d at 994 n.2).

We note that on June 29, 2004, following Appellant's unsuccessful direct appeal before this Court, our Supreme Court denied his petition for *allocatur*. His judgment of sentence became final ninety days later, on September 27, 2004. ***See Cophenhefer***, 941 A.2d at 648 n.5. He filed the instant petition more than seven years later, on April 13, 2012. Therefore, we must determine whether the PCRA court erred in concluding Appellant did not plead and prove one of the three timeliness exceptions.

In his amended PCRA petition, Appellant alleged that he "established application of the exception in . . . § 9545(b)(1)(i), due to a delay by prison officials in deliver[ing] the legal mail on time which cause[d him] to los[e] his appeal rights." Appellant's Amended PCRA Pet. at 4. He also asserted that "the failure to raise the claim previously [was] because he just obtained [an] affidavit from prison officials . . . explaining the mail problems . . . while the decision was still pending in the [T]hird Circuit." ***Id.*** (some punctuation

omitted). He explained that after obtaining the affidavit on March 30, 2012, he filed the instant petition on April 13. ***Id.*** at 5.

Appellant's claim of government official interference appears to be that a delay in the prison mail system caused him to miss the deadline for filing an appeal from the denial of his federal *habeas corpus* petition. He did not explain what decision was pending in the Third Circuit. Furthermore, to the extent he claimed he lost his direct appeal rights in the state courts, we note that he had a direct appeal in this Court. Appellant's claim, without any additional explanation, failed to plead and prove he was entitled to the timeliness exception of 9545(b)(1)(i).

Appellant's amended PCRA petition also averred twofold eligibility for the newly-recognized-constitutional-right exception of § 9545(b)(1)(iii). First, Appellant argued that in ***Martinez v. Ryan***, 132 S.Ct. 1309 (2012), the United States Supreme Court recognized "a constitutional right to an effective attorney in the collateral proceeding because it was the first place to raise the claim of ineffective assistance at trial." Appellant's Amended PCRA Pet. at 6 (emphasis omitted).

The clear language of ***Martinez*** refutes Appellant's claim:

> While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Martinez, 132 S.Ct. at 313. The ***Martinez*** Court did not decide a constitutional issue. Accordingly, Appellant failed to plead a timeliness exception based on ***Martinez***.

Finally, Appellant's amended petition argued that ***Missouri v. Frye***, 132 S.Ct. 1399 (2012), provided a basis for the § 9545(b)(1)(iii) time-bar exception. Appellant's Amended PCRA Pet. at 8. We note that the ***Frye*** Court held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions favorable to the accused." ***Frye***, 132 S.Ct. at 1408.

Appellant's amended petition stated:

> [H]is trial counsel never informed him of a plea offers, from prosecution, and that trial counsel Mr. W. Chris Montoya, [E]sq., never said anything about a plea bargains for a more lenient sentence. [B]ecause [Appellant] received his trial documents from the attorney by mail on January 18, 2003 at the SCI-Somerset, after reviewing the trial records. [Appellant] found a letter from the District [A]ttorney of the prosecution plea offers. [A]nd [Appellant would have entered a guilty plea on the robbery an[d] burglary, both [first-degree felonies], but the prosecution offers was 7 1/2 to 15 years[.] It should be determined that [Appellant] met both of the requirements for showing a Sixth Amendment violation under ***Strickland***[.]

Appellant's Amended PCRA Pet. at 8.

Contrary to Appellant's claim, ***Frye*** did not recognize a new constitutional right. Rather, applying ***Strickland v. Washington***, 466 U.S. 668 (1984), the ***Frye*** Court held that to render the effective assistance to which a criminal defendant is constitutionally entitled, defense counsel must

communicate formal plea offers from the prosecution to the defendant. ***Frye***, 132 S.Ct. at 1408–09. The defendant must show that "the result of the proceeding would have been different," in that "he would have accepted the offer to plead pursuant to the terms earlier proposed." ***Id.*** at 1410. The defendant must also show "a reasonable probability [that] neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented" "because a defendant has no right to be offered a plea." ***Id.*** ***Frye*** defined the contours of the existing right to counsel in the plea bargaining context. Accordingly, Appellant has failed to plead a timeliness exception under § 9545(b)(1)(iii).

Finally, we note that the PCRA court dismissed the instant petition without first issuing notice of its intent to do so as required by Pa.R.Crim.P. 907. In ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa. Super. 2007), this Court stated,

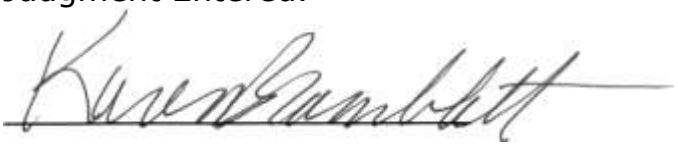
> Although the notice requirement set forth in Rule 907 has been held to be mandatory, Appellant has not objected to its omission and thereby has waived the issue. Moreover, the [Pennsylvania] Supreme Court has indicated, on at least one occasion, that when a PCRA petition is untimely filed, the failure to provide such notice is not reversible error.

Id. at 514 n.1 (citations omitted). Instantly, the PCRA court's failure to provide Rule 907 notice before dismissing Appellant's untimely PCRA petition was not reversible error, and, in any event, the issue is waived. ***See id.***

Having discerned no error of law, we affirm the order below. ***See Copenhefer***, 941 A.2d at 648.

Order affirmed. Appellant's "Motion to Dismiss[ed] Any Petition Filed by District Attorney" denied.

Judgment Entered.



Prothonotary

Date: 5/22/2013