

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LONNIE JENKINS,	:	
	:	
Appellant	:	No. 1066 WDA 2013

Appeal from the PCRA Order May 24, 2013,
Court of Common Pleas, Cambria County,
Criminal Division at No. CP-11-CR-0000821-2005

BEFORE: GANTMAN, P.J., DONOHUE and FITZGERALD*, JJ.

MEMORANDUM BY DONOHUE, J.: FILED: April 23, 2014

Appellant, Lonnie Jenkins (“Jenkins”), appeals from the trial court’s order dated May 24, 2013, dismissing as untimely his petition for relief filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46 (the “PCRA”). For the reasons that follow, we reverse the trial court’s order and remand the case for the appointment of counsel.

The trial court summarized the factual and procedural background of this case as follows:

In 2005, [Jenkins] plead guilty to two violations of the Controlled Substances Act. [Jenkins] was sentenced on these charges on October 18, 2005. Eventually, [Jenkins] was placed on parole and released. On August 12, 2011, based on [Jenkins’] conduct and the recommendation of the parole board, [the trial court] revoked [Jenkins’] parole and resentenced him.¹

*Former Justice specially assigned to the Superior Court.

On March 11, 2013, [Jenkins] filed the instant PCRA Motion. On April 5, 2013, in accordance with the Pennsylvania Rule of Criminal Procedure 907, the [trial court] notified [Jenkins] of its intention to dismiss [Jenkins'] PCRA Motion as untimely pursuant to the one[-]year jurisdiction requirement of 42 Pa.C.S.A. § 9545(b)(1), (3). [Jenkins] filed 'Petitioner's Response to Notice of Intent to Dismiss' on April 17, 2013. The Response failed to set forth an exception to the one[-]year jurisdiction requirement, and accordingly the [trial court] dismissed the PCRA Motion by order dated May 24, 2013. [Jenkins] filed a Notice of Appeal on June 25, 2013 and a Statement of Matters Complained of on Appeal ["Statement"] on July 24, 2013.

¹ On September 14, 2011, [Jenkins] filed a Nunc Pro Tunc Motion asking the [trial court] to consider modifying the August 12, 2011 sentence. On December 20, 2011, the Nunc Pro Tunc Motion was denied following a hearing. Thereafter, [Jenkins] filed an appeal with the Superior Court. On February 28, 2013, the Superior Court issued a Memorandum finding [Jenkins'] appeal untimely and quashing the appeal for lack of jurisdiction.

Trial Court Opinion, 8/22/2013, at 1.

Jenkins appeals the trial court's dismissal of his PCRA petition as untimely, raising the following issues for our review and consideration:

1. Did the lower court err when it dismissed [Jenkins'] PCRA petition?
2. Did the probation court err when it determined that [Jenkins] violated the terms of his probation?
3. Did probation counsel provide ineffective assistance of counsel relating to the probation/hearing and sentence?

Jenkins' Brief at 4.

Jenkins' PCRA petition appears to have been untimely filed. Pursuant to 42 Pa.C.S. § 9545, a PCRA petition must be filed within one year of the date the judgment becomes final. The trial court sentenced Jenkins on August 12, 2011, and thus his 30-day period within which to file a direct appeal expired on September 12, 2011. While Jenkins subsequently filed an untimely direct appeal, our Supreme Court has held that the one-year period for the filing of PCRA petitions commences upon the *actual* expiration of the time period for seeking direct review, and untimely notices of appeal play no role in the calculation of this time period. ***Commonwealth v. Brown***, 596 Pa. 354, 361, 943 A.2d 264, 268 (2008). Jenkins did not file the present PCRA petition until March 11, 2013, well beyond September 12, 2012 – one year after his judgment of sentence became final.

Despite the apparent untimeliness of his PCRA petition, we must nevertheless remand this case to the trial court for the appointment of counsel. Rule 904(C) of the Pennsylvania Rules of Criminal Procedure provides in relevant part that “when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief.” Pa.R.Crim.P. 904(C). In ***Commonwealth v. Ferguson***, 722 A.2d 177 (Pa. Super. 1998), this Court held that Rule 904 requires that a PCRA petitioner have the assistance of counsel in attempting to demonstrate that an exception to the

PCRA's one-year time limitation applies. *Id.* at 178. In *Ferguson* we concluded that Rule 904 mandates that an indigent petitioner is entitled to counsel even in the case of an untimely PCRA petition. *Id.* “[I]t is only after the PCRA court measures the facts against the provisions of section 9545(b), including the exceptions thereto, and decides that the petition is time-barred, that it will be divested of its authority to entertain the PCRA petition.” *Id.*; *see also Commonwealth v. Guthrie*, 749 A.2d 502, 504 (Pa. Super. 2000) (same).

Subsequently, in *Commonwealth v. Smith*, 572 Pa. 572, 818 A.2d 494 (2003), our Supreme Court reaffirmed this Court’s decision in *Ferguson* that counsel must be appointed on a first PCRA petition even when the petition appears to be untimely on its face. *Id.* at 582-83, 818 A.2d 499-500. The Supreme Court stated as follows:

Our decision in this case comports with the sound policy underlying Rule 904. The policy contained in Rule 904 is consistent with the long-standing directive by this Court to provide counsel to indigent petitioners filing their first collateral attack on their Judgment of Sentence. *Commonwealth v. Hoffman*, 426 Pa. 226, 232 A.2d 623 (1967). “[I]n this Commonwealth one who is indigent is entitled to the appointment of counsel to assist with an initial collateral attack after judgment of sentence.” *Commonwealth v. Duffey*, 551 Pa. 675, 713 A.2d 63, 69-70 (1998) (quoting *Commonwealth v. Albert*, 522 Pa. 331, 561 A.2d 736, 738 (1989)); *Albrecht, supra* (an unrepresented indigent petitioner who filed a first-time PCRA petition is entitled to have counsel appointed to represent him during the PCRA proceedings). Without legal

counsel, an indigent first-time PCRA petitioner would not know of the necessity of demonstrating the existence of an exception to the time-bar.

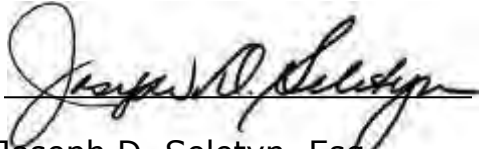
Id.

In this case, in his PCRA petition Jenkins represented to the trial court that he is indigent, checking the box on the PCRA form that states "I do not have a lawyer and I am without financial resources or otherwise unable to obtain a lawyer." PCRA Petition, 3/11/2013, at 7. The Commonwealth did not contest that Jenkins is indigent and the trial court made no finding to the contrary. In addition, Jenkins made a formal request for the appointment of counsel in his PCRA petition, checking the box stating that "I request the court to appoint a lawyer to represent me." ***Id.*** For these reasons, based upon, *inter alia*, ***Ferguson*** and ***Smith***, we must reverse the trial court's order dismissing Jenkins' PCRA petition as untimely and remand this case for the appointment of counsel. We note that the Commonwealth does not contest the necessity of so ruling, as in its appellate brief it concedes that Jenkins "appropriately stated the law as it relates to uncounseled PCRA petitions" and asks this Court either to affirm the trial court's ruling or "remand for the appointment of defense counsel." Commonwealth's Brief at 7-8.

Order reversed. Case remanded for the appointment of counsel. Jurisdiction relinquished.

J-S20016-14

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: 4/23/2014