

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MARLON GUNN,	:	
	:	
Appellant	:	No. 1517 WDA 2013

Appeal from the PCRA Order September 18, 2013
In the Court of Common Pleas of Erie County
Criminal Division No(s).: CP-25-CR-0003041-2005

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

MEMORANDUM BY FITZGERALD, J.: FILED: April 11, 2014

Pro se Appellant, Marlon Gunn, appeals from the order entered in the Erie County Court of Common Pleas that denied his second Post-Conviction Relief Act¹ ("PCRA") petition as untimely. He suggests that the trial court imposed an illegal sentence and that all prior counsel were ineffective for not challenging the legality of his sentence. He also states that the court erred by imposing consecutive sentences of imprisonment. We affirm.

We state the facts and procedural history set forth by a prior panel of this Court:

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

Following a two-day jury trial in April 2006, [Appellant] and a co-defendant ("Ware") were found guilty of involuntary deviate sexual intercourse, sexual assault, aggravated assault, criminal conspiracy, and unlawful restraint. These convictions arose from an incident that occurred on the campus of Edinboro University. In brief, on the morning of April 20, 2005, [Appellant] and Ware confronted the victim, Ryan Ortiz ("Ortiz"), about their suspicion that he had "snitched" on them the night before, resulting in a raid on their room by campus officials while they were smoking marijuana with other friends.

After waking Ortiz, [Appellant,] and Ware hit and punched Ortiz and then instructed Urlene Boissette ("Boissette"), a known dominatrix, to perform various acts on Ortiz. These involved escalating assaults including the pouring of urine over Ortiz's head, a beating with a belt that had handcuffs attached to it, and, ultimately, anal penetration with a dildo. [Appellant] and Ware restrained Ortiz while Boissette performed these acts. The matter came to an end when Boissette noticed blood on the dildo and ceased sodomizing him. When Boissette stopped, [Appellant] and Ware left the room. Ortiz was crying and in pain. Boissette, who was friends with Ortiz before these events, comforted him and spent the rest of the day with him. A subsequent physical examination revealed that Ortiz suffered lacerations, bruises, and an anal tear from this attack.

Initially embarrassed about these events, Ortiz did not go to the authorities. After encouragement from his family, however, Ortiz reported the incident to the police. He went to the police station and gave the police a statement about the events of that night, which was videotaped. Ortiz's report led to the arrest of [Appellant], Ware and Boissette.

. . . Following trial, [Appellant] was convicted of the aforementioned crimes and [on July 25, 2006, was] sentenced to an aggregate term of eight to 16 years of incarceration. This Court affirmed this judgment of sentence on direct appeal. ***Commonwealth v. Gunn***, 935 A.2d 11 (Pa. Super. 2007) (unpublished memorandum). [Appellant] filed a petition for allowance of appeal with the

Pennsylvania Supreme Court, which was denied on February 27, 2008. He then filed a *pro se* PCRA petition. Counsel was appointed and a supplemental PCRA petition was filed. On December 15, 2008, the [PCRA] court held a hearing on this matter, and on January 22, 2009, it dismissed [Appellant's] petition.

Commonwealth v. Gunn, 293 WDA 2009, at 1-3 (Pa. Super. Mar. 8, 2010). The ***Gunn*** Court affirmed the dismissal of Appellant's first PCRA petition on March 8, 2010, and Appellant appealed to our Supreme Court, which denied same on November 30, 2010.

On August 1, 2013, Appellant filed a *pro se* PCRA petition. The PCRA court issued a Pa.R.Crim.P. 907 notice on August 2, 2013. Appellant filed a response on August 21, 2013, which the court docketed on August 26, 2013. The PCRA court dismissed Appellant's petition on August 28, 2013. On September 20, 2013, the court docketed Appellant's timely notice of appeal, which was mailed on September 18, 2013. Appellant, also on September 18, 2013, filed a Pa.R.A.P. 1925(b) statement, although the court did not order one.

Appellant raises the following issues on appeal:

Whether a second or subsequent [PCRA petition] will be entertained based on a strong prima facie showing of a miscarriage of justice pertaining to an illegal sentence according to ***Commonwealth v. Lawson***, 549 A.2d 107 (Pa. 1988)?

Whether trial, direct appeal, and PCRA counsel was ineffective for not challenging the legality of [Appellant's] sentence, since this issue raises a pure question of law according to ***Commonwealth v. McClinic***, 909 A.2d 1241 ([Pa.] 2006)?

Whether the trial court erred [sic], when sentencing for the inchoate crime of conspiracy/sexual assault under the merging [sic] doctrine of the Pennsylvania Constitution and the Double Jeopardy Clause in the United States Constitution?

Appellant's Brief at 6.

Before examining the merits of Appellant's claims, our Supreme Court has required this Court to examine whether we have jurisdiction to entertain the underlying PCRA petition. **See Commonwealth v. Fahy**, 737 A.2d 214, 223 (Pa. 1999). "Our standard of review of a PCRA court's dismissal of a PCRA petition is limited to examining whether the PCRA court's determination is supported by the evidence of record and free of legal error." **Commonwealth v. Wilson**, 824 A.2d 331, 333 (Pa. Super. 2003) (*en banc*) (citation omitted). A PCRA petition "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." **Commonwealth v. Copenhefer**, 941 A.2d 646, 648 (Pa. 2007) (internal citations and footnote omitted).

The PCRA's timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed. It is the petitioner's burden to allege and prove that one of the [three] timeliness exceptions applies.

Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1267-68 (Pa. 2008) (internal citations omitted).

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). To preserve a claim for an illegal sentence, the PCRA must be timely filed. **See Fahy**, 737 A.2d at 223 (holding, “Although 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.”).

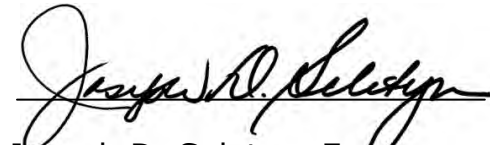
Instantly, we examine whether the PCRA court erred by holding Appellant’s second PCRA petition was untimely. **See** 42 Pa.C.S. § 9545(b)(1), (2); **Abu-Jamal**, 941 A.2d at 1267-68. The Pennsylvania Supreme Court denied Appellant’s petition for allowance of appeal on February 27, 2008. Appellant’s judgment of sentence became final on May 27, 2008. Appellant then had one year, until May 27, 2009, to file a PCRA petition. **See** 42 Pa.C.S. § 9545(b)(1).

Appellant filed the instant petition on August 1, 2013, almost four years later. Thus, this Court must discern whether the PCRA court erred in concluding Appellant did not plead and prove one of the three timeliness exceptions. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii); **Copenhefer**, 941 A.2d at 648.

In this case, Appellant did not plead and prove any of the timeliness exceptions. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii). Accordingly, we agree with the PCRA court's determination that Appellant has not proved one of the three timeliness exceptions. **See Abu-Jamal**, 941 A.2d at 1267-68; **Copenhefer**, 941 A.2d at 648. Thus, the PCRA court lacked jurisdiction to consider his petition, including his claim of an illegal sentence. **See Fahy**, 737 A.2d at 223. Having discerned no error of law, we affirm the order below. **See Wilson**, 824 A.2d at 333.

Order 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: 4/11/2014