

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

GEORGE IRVIN STROUP, JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1553 MDA 2012

Appeal from the PCRA Order entered August 6, 2012
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0000239-2006

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY OLSON, J.:

FILED MAY 20, 2013

Appellant, George Irvin Stroup, Jr., appeals from the order entered on August 6, 2012 dismissing as untimely his second petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. § 9541-9546. We affirm.

We summarize the facts and procedural history of this case as follows. In November 2006, a jury convicted Appellant of rape of a child, statutory sexual assault, aggravated indecent assault, indecent assault, and corruption of minors.¹ In August 2007, the trial court sentenced Appellant to five to 40 years of imprisonment, followed by 15 years of probation. This Court affirmed Appellant's judgment of sentence on November 24, 2008. ***Commonwealth v. Stroup***, 964 A.2d 948 (Pa. Super. 2008) (unpublished

¹ 18 Pa.C.S.A. §§ 3121, 3122.1, 3125, 3126, and 6301, respectively.

memorandum). Appellant did not appeal to the Pennsylvania Supreme Court.

On August 28, 2009, Appellant filed his first PCRA petition *pro se*. The PCRA court appointed counsel, who later petitioned to withdraw. On February 3, 2011, the PCRA court issued an opinion denying PCRA counsel's motion to withdraw and directing him to further investigate Appellant's claim that he was incompetent when he confessed to police and at the time of trial. PCRA counsel filed a supplemental PCRA petition and the PCRA court held an evidentiary hearing on July 11, 2011. On that same day, the PCRA court entered an order denying relief and notified Appellant of his right to appeal. Appellant did not appeal. Instead, almost one year later, on July 2, 2012, Appellant filed a *pro se* petition for writ of *habeas corpus*. The PCRA court considered the filing as a second petition under the PCRA and concluded it was untimely because Appellant did not raise an exception to the PCRA's strict one-year jurisdictional timing requirement. This timely appeal followed.²

² On July 9, 2012, the PCRA court entered an order notifying Appellant of its intent to dismiss Appellant's second PCRA petition without a hearing pursuant to Pa.R.Crim.P. 907. Appellant responded timely to the proposed dismissal, invoking the governmental interference exception to the timeliness requirements of the PCRA, 42 Pa.C.S.A. § 9545(b)(1)(i). On August 6, 2012, the trial court filed an opinion and order concluding Appellant failed to plead or prove the exception to the PCRA's one-year jurisdictional time bar and dismissed Appellant's second PCRA petition. Appellant filed a notice of appeal on August 27, 2012. The PCRA court did
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On appeal *pro se*, Appellant presents the following issues for our review:

1. Whether Appellant has stated an exception to the timeliness requirement of the PCRA, that being: the failure to raise the claim [of his competency at trial] previously was the result of interference by the government [...] in violation of the constitution or laws of this Commonwealth or the constitution or laws of the United States[?]
2. Whether PCRA counsel was effective in his “full” investigation into the competency of his client at trial and at the time he had waived his Miranda rights and provided a recorded confession to police[?]

Appellant’s Brief at 1 (complete capitalization and emphasis omitted).

Initially, we set forth our standard of review and the legal standards pertaining to jurisdiction under the PCRA:

A PCRA petition, including a second or subsequent one, must be filed within one year of the date the petitioner's judgment of sentence became final, unless he pleads and proves one of the three exceptions outlined in 42 Pa.C.S. § 9545(b)(1).^[fn] A judgment becomes final at the conclusion of direct review by [the Pennsylvania Supreme Court] or the United States Supreme Court, or at the expiration of the time for seeking such review. The PCRA's timeliness requirements are jurisdictional; therefore, a court may not address the merits of the issues raised if the petition was not timely filed. The timeliness requirements apply to all PCRA petitions, regardless of the nature of the individual claims raised therein. The PCRA squarely places upon the petitioner the burden of proving an untimely petition fits within one of the three exceptions. The PCRA further

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not order, nor did Appellant file, a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

requires a petition invoking one of these exceptions to be filed within 60 days of the date the claim could have been presented. On appeal from the denial of PCRA relief, [an appellate court] decides whether the findings of the PCRA court are supported by the record and free of legal error.

[fn] These 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).

Commonwealth v. Jones, 54 A.3d 14, 16-17 (Pa. 2012).

"[A] judgment becomes final at the conclusion of direct review, 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." 42 Pa.C.S.A. § 9545(b)(3). As mentioned, this Court affirmed Appellant's judgment of sentence on November 24, 2008. Appellant, therefore, had 30 days after our Court affirmed his judgment of sentence to seek further review by our Supreme Court. **See** Pa.R.A.P. 1113(a); ***Commonwealth v. Hutchins***, 760 A.2d 50, 54 (Pa. Super. 2000). Since he did not avail himself of this opportunity, Appellant's judgment of sentence became final on December 24, 2008. As Appellant filed his current PCRA petition on July 2, 2012, it was patently untimely.

Appellant invokes the governmental interference exception to the PCRA's jurisdictional one-year time bar. Appellant's Brief at 7-9. He asserts that before the PCRA court dismissed his first PCRA petition, the court specifically denied PCRA counsel's motion to withdraw to fully investigate Appellant's competency claims. *Id.* at 8. Appellant argues that the PCRA court never ruled on the merits of this claim, which then prevented him from appealing the decision to this Court previously. *Id.* at 9.

Our review of the certified record, however, belies Appellant's contention. Thus, his claim fails. Appellant initially raised the governmental interference exception in his Rule 907 response to the proposed dismissal of his current PCRA petition. In his response, Appellant argued that the government interfered with his right to file a PCRA petition when the PCRA court failed to assign him a new attorney after PCRA counsel filed a petition to withdraw from Appellant's initial PCRA proceeding. *See* PCRA Court Opinion, 8/6/2012, at 2, *citing* Appellant's Response to Intent to Dismiss at ¶11. Although Appellant now claims there was a conflict of interest with counsel, he did not advance this claim at that time before the PCRA court or on appeal from the denial of relief on his first PCRA petition. *See* Pa.R.A.P. 302(a).

The PCRA court fully addressed Appellant's competency issue raised in the first PCRA petition by holding an evidentiary hearing on July 11, 2011. At that time, the PCRA court stated its reasons for the denial on the record and told Appellant his appellate rights. Appellant has not pled or proven

how the government interfered with his ability to file a claim under the PCRA in order to qualify as an exception to strict jurisdictional timing requirements.

Moreover, even if the PCRA court had jurisdiction to address Appellant's current claim,

a [PCRA] petitioner must show that the claims of error have not been previously litigated or waived. An issue has been waived if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post-conviction proceeding. An issue has been previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue.

Spotz, 18 A.3d at 259.

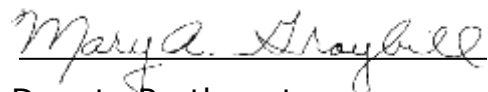
In this case, it is clear that Appellant's challenge to his competency to stand trial was raised in a prior PCRA petition and was subject to an evidentiary hearing. Instead of appealing the PCRA court's decision to deny relief, he filed the current PCRA petition almost one year later, raising the identical claim. Hence, Appellant's current claim was previously litigated. Furthermore, by failing to appeal the prior PCRA decision to this Court, the issue is waived. For all of the foregoing reasons, Appellant's first issue on appeal must fail. **Id.**

In his second issue, Appellant claims that PCRA counsel was ineffective for failing to investigate the competency issue fully. However, "a claim of ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits." **Commonwealth v. Morris**, 175, 822

A.2d 684, 694 (Pa. 2003) (citation omitted). "Allowing a claimant to circumvent the time requirements of the PCRA by couching his claims in terms of ineffectiveness would clearly thwart [the PCRA's] purpose" of striking "a reasonable balance between the need for finality and the convicted person's need to demonstrate that there has been an error in the proceedings that resulted in his conviction." ***Id.*** Thus, to the extent that Appellant attempts to raise the claims in his petition by alleging PCRA counsel's ineffectiveness, we do not have jurisdiction to review such claims.

Order affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 5/20/2013