

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

HAROLD EDWIN LEPHART

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1777 MDA 2013

Appeal from the PCRA Order September 6, 2013
In the Court of Common Pleas of Huntingdon County
Criminal Division at No(s): CP-31-CR-0000047-2008

BEFORE: PANELLA, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.:

FILED APRIL 15, 2014

Appellant, Harold Edwin Lephart, appeals from the September 6, 2013 order dismissing as untimely his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The relevant facts and procedural history of this case may be summarized as follows. On October 14, 2008, a jury convicted Appellant of one count of aggravated assault.¹ On October 27, 2008, the Commonwealth filed a notice to seek a mandatory sentence pursuant to 42 Pa.C.S.A. § 9714(a). Thereafter, on October 29, 2008, the trial court sentenced Appellant to a term of 10 to 20 years' imprisonment, pursuant to Section

¹ 18 Pa.C.S.A. § 2702(a)(1).

9714(a). This sentence was consecutive to the sentence Appellant was serving following his conviction for an unrelated matter in Indiana County. On November 7, 2008, Appellant filed a timely post-sentence motion, which was denied by the trial court on April 24, 2009. On May 21, 2009, Appellant filed a timely notice of appeal, and this Court affirmed his judgment of sentence on September 22, 2010. ***See Commonwealth v. Lephart***, 13 A.3d 990 (Pa. Super. 2010) (unpublished memorandum). Appellant did not file a petition for allowance of appeal with our Supreme Court. Appellant was represented at trial and on appeal by David G. Smith, Esquire (Attorney Smith).

On November 21, 2011, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel to represent Appellant, and on September 24, 2012, counsel filed an amended PCRA petition on Appellant's behalf. On July 26, 2013, the PCRA court conducted an evidentiary hearing. Following said hearing, the PCRA court dismissed Appellant's PCRA petition as untimely on September 6, 2013. This timely appeal followed on September 24, 2013.²

On appeal, Appellant raises the following issues for our review.

1. Whether th[e PCRA court] failed to properly consider [Appellant's] Post Conviction Relief Petition including Constitutional Deprivations such as Ineffective Assistance of Counsel and Denial of Due Process where the [PCRA c]ourt alleges that the Petition was filed outside of

² Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

the one year statutory mandate found in 42 Pa.C.S.A. § 9545 (b)?

2. More specifically whether the one year time frame had run where [Appellant] last heard from his court-provided attorney in a letter dated December 1, 2010, that the attorney was not going to Petition for Allowance of Appeal because he was untimely (due October 22, 2010) and [Appellant] filed his *pro[]se* PCRA on November 21, 2011?
3. Assuming that [Appellant's] Petition for Post-Conviction Relief was timely, whether [Appellant's] trial attorney was Ineffective for failing to raise the preserved issue on appeal relative to the Prosecutor advising [Appellant] that if he did not accept a plea deal the Prosecutor would recommend [Appellant] remain in the Restricted Housing Unit for the duration of whatever sentence he received?

Appellant's Brief at 1-2.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted), *cert. denied*, ***Edmiston v. Pennsylvania***, 134 S. Ct. 639 (2013). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence

arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). “[T]his Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

Before we may address the merits of a PCRA petition, we must first consider the petition’s timeliness because it implicates the jurisdiction of both this Court and the PCRA court. **Commonwealth v. Williams**, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). We may raise issues concerning our appellate jurisdiction *sua sponte*. **Commonwealth v. Patterson**, 940 A.2d 493, 497 (Pa. Super. 2007), *appeal denied*, 960 A.2d 838 (Pa. 2008). “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.” **Id.** The PCRA “confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]” **Commonwealth v. Watts**, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). This is to “accord finality to the collateral review process.” **Id.** “A petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.”

Commonwealth v. Harris, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009).

Section 9545 provides, in relevant part, as follows.

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(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.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

...

42 Pa.C.S.A. § 9545(b).

In the instant matter, Appellant was sentenced to a term of 10 to 20 years' imprisonment on October 29, 2008. As noted, this Court affirmed

Appellant's judgment of sentence on September 22, 2010, and Appellant did not file a petition for allowance of appeal with our Supreme Court. **See *Lephart, supra***. Thus, Appellant's judgment of sentence became final on October 22, 2010, 30 days after this Court affirmed his judgment of sentence and when the time to file a petition for allowance of appeal with our Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3) (stating, "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[]"); **see also** Pa.R.A.P. 1113. Therefore, in order to be timely, Appellant's PCRA petition had to be filed by October 22, 2011. As noted, Appellant filed his *pro se* PCRA petition on November 21, 2011, nearly 30 days past the deadline. Accordingly, Appellant's petition is untimely, and Appellant must plead and prove one of the three enumerated statutory exceptions to the time-bar.

Our review reveals that Appellant has neither alleged nor proven a cognizable exception to the PCRA time-bar. Notably, the "Argument" section of Appellant's brief does not contain any citation whatsoever to Section 9545. Rather, Appellant contends the one-year time period for him to file a timely PCRA petition commenced on December 1, 2010, because that was the date of the letter Attorney Smith sent to him concerning direct appellate

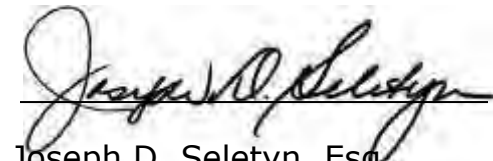
review of his judgment of sentence. Appellant's Brief at 8. This argument is without merit.

Without a pled and successfully proven exception to the time-bar, this Court is without jurisdiction to address the merits of the arguments raised. ***Commonwealth v. Perrin***, 947 A.2d 1284, 1285 (Pa. Super. 2008). In any event, courts in this Commonwealth have continually rejected arguments that the PCRA's one-year jurisdictional time-bar should be tolled. "[A]part from the specifically enumerated exceptions contained in Section 9545(b), the period for filing a PCRA petition is not subject to the doctrine of equitable tolling[.]" ***Commonwealth v. Lewis***, 63 A.3d 1274, 1279 (Pa. Super. 2013), *citing* ***Commonwealth v. Fahy***, 737 A.2d 214, 222 (Pa. 1999), and ***Commonwealth v. Rienzi***, 827 A.2d 369, 371 (Pa. 2003) (internal quotation marks omitted; bracket in original); **see also** PCRA Court Opinion, 11/14/13, at 3.

Accordingly, having concluded that Appellant's PCRA petition was untimely filed and that no cognizable exception to the time-bar applies, we discern no error on the part of the PCRA court in dismissing said petition as untimely. Therefore, we affirm the September 6, 2013 order of the PCRA court.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014