

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JUSTIN ZANE HESS,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1983 MDA 2012

Appeal from the Order entered October 10, 2012,  
in the Court of Common Pleas of Adams County, Criminal Division,  
at Nos: CP-01-CR-0000273-2007, CP-01-CR-0000282-2007,  
CP-01-CR-0000572-2005, CP-01-CR-000678-2008, CP-01-CR-0001041-  
2006, CP-01-CR-0001062-2006 & CP-01-CR-0001139-2006.

BEFORE: PANELLA, ALLEN, and COLVILLE,\* JJ.

MEMORANDUM BY ALLEN, J.:

**FILED MAY 23, 2013**

Justin Zane Hess ("Appellant") appeals from the order denying his petition for relief under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. sections 9541-46. In addition, PCRA counsel has filed a petition to withdraw. We grant PCRA counsel's petition to withdraw and affirm the PCRA court's order denying post-conviction relief.

The PCRA court summarized the pertinent facts and procedural history as follows:

On June 1, 2007, Appellant entered into counseled pleas of guilty to two counts of burglary, three counts of terroristic threats, and one count of simple assault. [Appellant] was sentenced pursuant to a negotiated plea

\*Retired Senior Judge assigned to the Superior Court.

agreement. On October 18, 2007, Appellant entered a counseled plea of guilty to stalking. As the offense date for the stalking conviction pre-dated the sentencing date on the other convictions, revocation proceedings were not initiated on the June 1, 2007 sentences. However, on September 15, 2008, Appellant entered a counseled plea of guilty to driving under the influence of alcohol. Once again, Appellant was sentenced pursuant to a negotiated plea agreement. Since [Appellant's] conviction violated the conditions of the sentences resulting from the previous convictions, on November 21, 2008, Appellant was revoked on each of the sentences he was serving and re-sentenced pursuant to the terms of a negotiated agreement.

On March 11, 2009, revocation proceedings were once again initiated against [Appellant] on all of the foregoing sentences. The basis of the revocation was Appellant's unauthorized leave from electronic monitoring and additional criminal conduct. On April 29, 2010, Appellant appeared before the Court with counsel and acknowledged violating the conditions of his supervision. Appellant was re-sentenced on June 24, 2010 after the Court reviewed a pre-sentence investigation. The aggregate sentences upon re-sentencing totaled 11½ years to 23 years of partial confinement in a state correctional institution, with credit granted to Appellant for time previously incarcerated. Appellant filed neither post-sentence motions nor a direct appeal from the re-sentencings.

On June 28, 2012, Appellant filed a pro se [PCRA] petition. The petition consisted of 33 separate pages and was comprised of the standard [PCRA] pro se petition form with an additional attachment generally described as an addendum. The document included a litany of claims and cited the Constitution and numerous federal, state, and local cases. Claims including challenges to the legitimacy and jurisdiction of the court, the qualifications of the "prosecuting attorney," a lack of subject matter jurisdiction, and other nonsensical ramblings. Included in the claim of alleged errors was a statement that counsel failed to notify and inform [Appellant] that a requested direct appeal was not filed on his behalf. Appellant claimed this alleged failure to be government interference, justifying the untimely filing of his petition. As the petition

was confusing, included haphazard gibberish, and lacked information sufficient to evaluate the merit of any claim relating to timeliness, the Court appointed counsel and granted Appellant 60 days from the appointment of counsel within which to file an amended [PCRA] petition. Appellant and [PCRA] counsel were further advised that the Court intended on dismissing the [PCRA petition] based upon non-compliance with the jurisdictional requirements of 42 Pa.C.S.A. § 9545(b) unless [Appellant] filed an amended petition alleging [an appropriate] exception to the statutory time limits within 60 days of the date of the notice. Appellant filed no further pleadings. Accordingly, on October 10, 2012, [Appellant's PCRA petition] was dismissed without a hearing. In the Order of Court dismissing the petition, [Appellant] was advised that the dismissal without a hearing was based upon the Court's lack of jurisdiction pursuant to 42 Pa.C.S.A. § 9545(b).

PCRA Court Opinion, 1/3/13, at 1-3 (footnotes omitted). This timely appeal followed. Both Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

On February 19, 2013, PCRA counsel filed with this Court a petition to withdraw as counsel and "no-merit" letter pursuant to the dictates of ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). Thus, we first assess counsel's assertion that Appellant's PCRA petition is untimely, and that Appellant has failed to establish an exception to the PCRA's time bar.

Our Supreme Court has recently summarized:

These cases establish the procedure for withdrawal of court-appointed counsel in collateral attacks on criminal convictions. Independent review of the record by competent counsel is required before withdrawal is permitted. Such independent review requires proof of:

- 1) A “no-merit” letter by PCRA counsel detailing the nature and extent of his [or her] review;
- 2) A “no-merit” letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
- 3) The PCRA counsel’s “explanation”, in the “no-merit” letter, of why the petitioner’s issues were meritless;
- 4) The PCRA court conducting its own independent review of the record; and
- 5) The PCRA court agreeing with counsel that the petition was meritless.

***Commonwealth v. Pitts***, 981 A.2d 875, 876 n.1, (Pa. 2009) (citations omitted). Counsel in this case has complied with the mandates of ***Turner*** and ***Finley***, as summarized in ***Pitts, supra***. Thus, we must determine whether we agree with counsel’s assessment of Appellant’s claim.

This Court’s standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Halley***, 870 A.2d 795, 799 n.2 (Pa. 2005). The PCRA court’s findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001). Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that the petitioner’s claim is patently frivolous and is without a trace of support in either the

record or from other evidence. ***Commonwealth v. Jordan***, 772 A.2d 1011 (Pa. Super. 2001).

Generally, 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, an exception to the time for filing the petition. ***Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S.A. § 9545(b)(1). Under these exceptions, the petitioner must plead and prove: “(1) there has been interference by government officials in the presentation of the claim; or (2) there exists after-discovered facts or evidence; or (3) a new constitutional right has been recognized.” ***Commonwealth v. Fowler***, 930 A.2d 586, 591 (Pa. Super. 2007) (citations omitted). A PCRA petition invoking one of these statutory exceptions must “be filed within sixty days of the date the claim first could have been presented.” ***Id. See also*** 42 Pa.C.S.A. § 9545(b)(2). Moreover, exceptions to the time restrictions of the PCRA must be pled in the petition, and may not be raised for the first time on appeal. ***Commonwealth v. Burton***, 936 A.2d 521, 525 (Pa. Super. 2007); ***see also*** Pa.R.A.P. 302(a) (“Issues not raised before the lower court are waived and cannot be raised for the first time on appeal.”).

Appellant’s judgment of sentence became final on or about July 26, 2010, thirty days after the time for filing a direct appeal to this Court had expired. 42 Pa.C.S.A. § 9545(b)(3). Therefore, Appellant had to file his

PCRA petition by July 26, 2011, in order for it to be timely. As Appellant filed his *pro se* PCRA petition on June 28, 2012, it is untimely unless he has satisfied his burden of pleading and proving that one of the enumerated exceptions applies. **See *Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999).

As noted by the PCRA court, within his *pro se* petition, Appellant asserted that trial counsel's alleged failure to inform him that counsel did not file a requested direct appeal on Appellant's behalf met the "governmental interference" exception to the PCRA's time bar. 42 Pa.C.C.A. § 9545(b)(2)(i). Because the PCRA specifically excludes defense counsel as "government officials," Appellant's claim relating to the ineffectiveness for failing to file the requested appeal does not qualify under the government interference exception to the timeliness requirements of the PCRA. **See generally**, 42 Pa.C.S.A. § 9545(b)(4); ***Commonwealth v. Abu-Jamal***, 833 A.2d 719 (Pa. 2003). Moreover, even if Appellant has asserted that he only recently discovered that trial counsel failed to file a timely appeal that Appellant allegedly requested, Appellant has not established that this "after-discovered" fact could not have been ascertained earlier by the exercise of due diligence. **See generally**, 42 Pa.C.S.A. 9545(b)(2)(ii); ***Commonwealth v. Taylor***, 933 A.2d 1035 (Pa. Super. 2007).

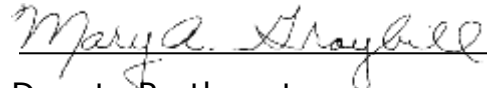
In sum, because our review of the record supports the PCRA court's determination that Appellant's PCRA petition failed to meet any exception to

J-S30019-13

the PCRA's time bar, we affirm its order dismissing Appellant's petition and grant PCRA counsel's petition to withdraw.

Petition to withdraw granted. Order affirmed.

Judgment Entered.

  
Deputy Prothonotary

Date: 5/23/2013