

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

GAREY THOMAS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2223 MDA 2013

Appeal from the PCRA Order November 14, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0001553-1984

BEFORE: BENDER, P.J.E., BOWES, and PANELLA, JJ.

MEMORANDUM BY BOWES, J.:

FILED JULY 23, 2014

Garey Thomas appeals from the PCRA order entered November 14, 2013, dismissing his serial PCRA petition as untimely. We affirm.

A jury found Appellant guilty of murder on March 14, 1985. The court sentenced him to a mandatory term of life imprisonment. This Court affirmed on direct appeal and the Pennsylvania Supreme Court denied Appellant's allowance of appeal. ***Commonwealth v. Thomas***, 554 A.2d 1045 (Pa.Super. 1988) (unpublished memorandum), *allowance of appeal denied*, 553 A.2d 967 (Pa. 1988). Appellant filed a *pro se* PCRA petition on May 30, 1990, and was appointed counsel. Appellant submitted a *pro se* amended petition on July 9, 1990, and counsel filed a memorandum of law on behalf of Appellant. The PCRA court denied PCRA relief on July 21, 1992, after a hearing held on April 4, 1992. Appellant did not appeal.

Appellant filed the instant petition on May 23, 2012. Despite not being automatically entitled to counsel, the court appointed counsel. Counsel filed a petition to withdraw and no-merit letter pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa.Super. 1988) (*en banc*). The PCRA court issued a Pa.R.Crim.P. 907 notice of intent to dismiss, agreeing with counsel's conclusion that Appellant's petition was untimely, and granting counsel's request to withdraw. Appellant filed a response and the PCRA court entered a final order on November 14, 2013. This timely appeal ensued. Appellant presents three issues for our consideration.

[1.] Have the [l]ower [c]ourts erred in dismissing appellant's P.C.R.A. [p]etition without first appointing a substitute counsel to file an [a]mended [p]etition?

[2.] Did trial counsel provide appellant with ineffective assistance of counsel, thus, violating appellant's constitutional rights under the Sixth Amendment protections?

[3.] Should the [l]ower [c]ourts have appointed substitute counsel for appellant so counsel can file an amended petition?

Appellant's brief at 6.

Here, it is apparent that Appellant's first and last issues pertain to the same claim. Appellant asserts that based on Pa.R.Crim.P. 904, once the court appointed him an attorney, he was entitled to counsel throughout his post-conviction proceedings, including any appeal. According to Appellant, the PCRA court disagreed with **Turner/Finley** counsel's conclusions, but failed to appoint substitute counsel.

Appellant's issue is entirely devoid of merit. First, the PCRA court expressly agreed with **Turner/Finley** counsel's determination that Appellant's petition was untimely. The court first delineated that **Turner/Finley** counsel "concluded that after a careful review of the record, Defendant's PCRA petition is untimely, and thus, this court lacks jurisdiction to entertain the [p]etition." Pa.R.Crim.P. 907 Notice, 9/11/13 at 1. It continued, "[n]ot[h]ing in the content of Defendant's [l]etter [b]rief to President Judge Joseph Madenspacher or the exhibits thereto leads the court to disagree with the above-stated conclusions reached by [**Turner/Finley** counsel]. *Id.* at 2. The court in its notice permitted counsel to withdraw. Once an attorney adequately complies with **Turner/Finley**, a petitioner is not entitled to the appointment of new counsel. **Commonwealth v. Maple**, 559 A.2d 953 (Pa.Super. 1989); **see also Commonwealth v. Rykard**, 55 A.3d 1177, 1183 n.1 (Pa.Super. 2012). Accordingly, Appellant is not entitled to counsel for purposes of litigating this appeal or a remand to re-litigate his serial PCRA petition.

Appellant also contends that trial counsel was ineffective in failing to advise him to accept a plea deal of ten to twenty years where trial counsel allegedly incorrectly asserted that such a period of incarceration would be the maximum sentence he would receive if convicted. In order for a collateral petition to be timely under the PCRA, it must be filed within one year of the finality of the petitioner's judgment of sentence. 42 Pa.C.S. §

9545(b)(1). Where a defendant was convicted before the effective date of the 1995 PCRA time-bar amendment, a petitioner could timely file a petition if it was his first and was filed by January 16, 1997. **Commonwealth v. Sneed**, 45 A.3d 1096, 1102 n.5 (Pa. 2012); **Commonwealth v. Thomas**, 718 A.2d 326 (Pa.Super. 1998) (*en banc*). Here, Appellant could only file a timely petition by asserting one of three timeliness exceptions. Those exceptions include interference by government officials, newly-discovered facts that were unknown to the petitioner and which could not have been ascertained with due diligence, or a new constitutional right held to apply retroactively. 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). Any claim arguing an exception to the time-bar must be filed within sixty days of the date it could have been presented. 42 Pa.C.S. § 9545(b)(2).

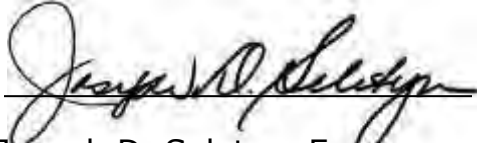
In Appellant's view, his claim is timely based on the United States Supreme Court decisions in **Lafler v. Cooper**, 132 S.Ct. 1376 (2012), and **Missouri v. Frye**, 132 S.Ct. 1399 (2012), which were decided on March 21, 2012. Relying on the dissenting opinions of Justice Antonin Scalia, Appellant maintains that those decisions are new constitutional rules. However, he does not argue that these decisions are retroactive. Regardless, this Court has held that these decisions do not announce new constitutional rules of

law. ***Commonwealth v. Feliciano***, 69 A.3d 1270 (Pa.Super. 2013).¹

Thus, Appellant's petition was untimely.

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: 7/23/2014

¹ We add that under Pennsylvania law, it has been longstanding law that counsel can be ineffective for failing to properly advise his client regarding plea deals. ***Cf. Commonwealth v. Korb***, 617 A.2d 715 (Pa.Super. 1992); ***Commonwealth v. Copeland***, 554 A.2d 54 (Pa.Super. 1988); ***Commonwealth v. Napper***, 385 A.2d 521 (Pa.Super. 1978).