

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MICHAEL HARPER

Appellant

No. 76 EDA 2013

Appeal from the PCRA Order December 3, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0208231-1998

BEFORE: SHOGAN, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.:

FILED APRIL 22, 2014

Michael Harper appeals from the order entered on December 3, 2012, in the Court of Common Pleas of Philadelphia County, denying him relief, without a hearing, on his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* The PCRA court determined Harper's petition was untimely. After a thorough review of the submission by Harper, the certified record, and relevant law, we affirm.¹

* Retired Senior Judge assigned to the Superior Court.

¹ Harper has raised two issues in his appeal, a claim that counsel constructively abandoned him by failing to perfect a timely appeal, and that the PCRA court erred in dismissing his petition without a hearing. Given our disposition of this matter, we will not address these claims.

On May 12, 1998, Harper entered into a negotiated plea to charges of aggravated assault and trespassing.² His agreed upon sentence was 11½ to 23 months' incarceration followed by five years of probation. On September 4, 2003, Harper's probation was revoked due to his conviction on multiple charges, including, rape, involuntary deviate sexual intercourse, forgery and child endangerment. Harper was given a sentence of five to ten years' incarceration, consecutive to the sentences imposed on the new crimes.

Harper filed a timely motion for reconsideration of his violation of probation (VOP) sentence. Although the VOP court scheduled a hearing on the motion for reconsideration, and continued the hearing for more than two years, the VOP court never vacated the sentence or expressly granted reconsideration. The motion was eventually denied on November 22, 2005.³

Harper filed, *pro se*, this PCRA petition on December 7, 2009, within 60 days of his discovery that his motion had been denied but not docketed. Harper was appointed counsel, who filed an amended petition on Harper's behalf. That petition claimed the petition was timely due to the fact the November 2005 order was never docketed. Appointed counsel withdrew and substitute counsel was appointed. On October 24, 2012, the PCRA court

² 18 Pa.C.S. §§ 2702 and 3503, respectively.

³ The November 22, 2005 order was never entered on the docket and there was no indication, pursuant to Pa.R.Crim.P. 114, that notice of the order was ever served on either Harper or his counsel.

filed a Pa.R.Crim.P. 907 notice of intent to dismiss without a hearing, based upon the untimeliness of the PCRA petition. The petition was formally denied on December 3, 2012. This timely appeal followed.

Preliminarily, we note, “Our standard of review of an order denying PCRA relief is whether the record supports the PCRA court’s findings of fact, and whether the PCRA court’s determination is free of legal error.” ***Commonwealth v. Wantz***, 84 A.3d 324, 331 (PA. Super. 2014) (citations omitted).

Here, as stated, Harper was sentenced on September 4, 2003. Pursuant to Pa.R.Crim.P. 708(D) [now Rule 708(E)] a defendant has 10 days in which to file a motion to modify a sentence and 30 days in which to file an appeal. Absent an express grant of reconsideration or vacation of sentence, the 30-day appeal period is not tolled. ***Commonwealth v. Coleman***, 721 A.2d 798, 799 n.2 (Pa. Super. 1998).⁴

⁴ ***Coleman*** references Pa.R.A.P. 1701(b)(3)(ii) for interpretation of Rule 708, including the express grant of reconsideration. Appellate Rule 1701 applies to both civil and criminal actions. 721 A.2d at 799, n.2. The interpretation and application of the “expressly granting” language in subsection (b)(3)(ii) is strict. Although Rule 1701(b)(3)(ii) does not require the trial court ultimately grant the relief sought in a motion for reconsideration of sentence before tolling the 30-day requirement, the mere scheduling of a hearing on a motion for reconsideration will not toll the appeal period. ***See Est. of Haiko v. McGinley***, 799 A.2d 155 (Pa. Super. 2002). ***See also Witherspoon v. Wal-Mart Stores, Inc.***, 814 A.2d 1222 (Pa. Super. 2002) (establishment of briefing schedule, hearing date, or issuance of rule to show cause does not suffice to prevent 30-day appeal period from expiring absent express grant of reconsideration).

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Accordingly, in this case, under the interpretation of Rule 708 as determined by case law, even though the VOP court scheduled a hearing on Harper's motion for reconsideration for a date after the 30-day appeal period had expired, that action did not toll the appeal period because the VOP court neither vacated the sentence nor expressly granted reconsideration. Therefore, Harper's appeal was due by October 6, 2003.⁵ Because no appeal from his sentence was filed, any PCRA petition had to be filed within a year of that date. **See** 42 Pa.C.S. § 9545(b).⁶ However, Harper's PCRA petition was not filed until 2009.

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Therefore, to fully ensure one's appellate rights are preserved under Pa.R.Crim.P. 708 and Pa.R.A.P. 1701, the notice of appeal may be filed along with the motion for reconsideration. **See Commonwealth v. Moir**, 766 A.2d 1253 (Pa. Super. 2000); **Valley Forge Center Associates v. Rib-It/K.P., Inc.**, 693 A.2d 242 (Pa. Super. 1997) (filing notice of appeal along with motion for reconsideration preserves appellate rights if trial court fails to expressly grant petition within 30 days or denies petition).

⁵ The thirtieth day from September 4, 2003, which was October 4, 2003, fell on a Saturday.

⁶ Section 9545(b) states, in relevant part:

(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

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“The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims.” **Commonwealth v. Seskey**, ___A.3d ___, 2014 PA Super 27 (Pa. Super 2014) (citations omitted). Here, Harper’s petition is patently untimely and Harper has neither pled nor proven entitlement to any of the timeliness exceptions

(Footnote Continued) _____

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.

(3) For purposes of this subchapter, 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.

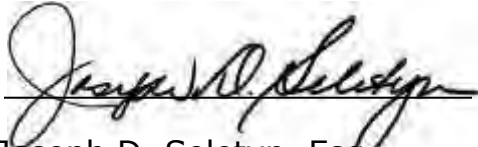
42 Pa.C.S. § 9545(b).

found in subsection (b)(1)(i)-(iii).⁷ As such, the PCRA court correctly concluded that it lacked jurisdiction to consider Harper's untimely petition.

Because the certified record supports the PCRA courts' determination that the petition was untimely, and no exception applies, the PCRA court did not abuse its discretion or commit an error of law in dismissing Harper's petition.

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: 4/22/2014

⁷ Harper attempted to claim his petition was timely because the order denying his motion for reconsideration, dated November 22, 2005, was not properly docketed and he filed his petition within 60 days of discovering that fact. However, that order had no effect as the 30-day period for modification of sentence and the time for appeal had both expired years previously.