NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
RICHARD W. ILLES, SR.,	:	
	:	
Appellant	:	No. 174 MDA 2013

Appeal from the Order Entered January 2, 2013,
In the Court of Common Pleas of Lycoming County,
Criminal Division, at No. CP-41-CR-0000050-2003.

BEFORE: BENDER, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED SEPTEMBER 10, 2013**

Appellant, Richard W. Illes, Sr., appeals *pro se* from the order denying his second petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In a memorandum decision addressing the appeal in Appellant's first PCRA petition, we summarized the procedural history of this case as follows:

> In 2004, a jury found Appellant guilty of first degree murder for the killing of his wife. Appellant was sentenced to life imprisonment without the possibility of parole. On appeal, we affirmed Appellant's judgment of sentence. [***Commonwealth v. Illes***, 1131 MDA 2004, 898 A.2d 1129 (Pa. Super. filed March 2, 2006) (unpublished memorandum)]. On August [17,] 2006, our Supreme Court denied Appellant's petition for allowance of appeal. [***Commonwealth v. Illes***, 906 A.2d 540 (Pa. 2006)]. Appellant then filed the timely underlying PCRA petition. After the trial court gave notice of its intent to dismiss, Appellant filed a Second Amended Petition. The trial court then held a hearing

> on several of the issues raised by Appellant, yet it subsequently denied the petition.

Commonwealth v. Illes, 241 MDA 2010, 31 A.3d 750 (Pa. Super. filed June 21, 2011), unpublished memorandum, at 1-2. This Court affirmed the PCRA court's order dismissing Appellant's PCRA petition on June 21, 2011, and we subsequently denied his petition for reargument on September 2, 2011.

On September 8, 2011, Appellant filed the instant PCRA petition and on January 2, 2013, the PCRA court dismissed the PCRA petition. This appeal followed.

Appellant presents the following issues for our review:

> DID THE LOWER COURT ERR WHEN IT DETERMINED THAT APPELLANT'S WAIVED, AND/OR PROCEDURALLY DEFAULTED, FIRST PCRA APPEAL RIGHTS COULD NOT BE RESTORED BECAUSE THE PRIOR LOWER COURT JUDGE HAD DETERMINED THAT THE ISSUES HAD NO MERIT, THUS DEPRIVING APPELLANT OF HIS RIGHT TO MERITS REVIEW BY PENNSYLVANIA APPELLATE AND FEDERAL HABEAS CORPUS COURTS OF THE FOLLOWING ARGUABLY MERITORIOUS ISSUES?
>
> > A. WERE TRIAL ATTORNEYS INEFFECTIVE FOR NOT OBJECTING TO THE ADMISSION OF A 50 YEAR OLD PHOTOGRAPH THAT THE STATE ARGUED DIRECTLY LINKED DR. ILLES TO THE MURDER WEAPON?
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> > B. WERE TRIAL ATTORNEYS INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION WHEN HIGHLY PREJUDICIAL STATEMENTS WERE ADMITTED ONLY AS "STATE OF MIND" EVIDENCE?
> >
> > C. WERE TRIAL ATTORNEYS INEFFECTIVE FOR NOT OBJECTING TO A HIGHLY PREJUDICIAL,

> UNBALANCED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE-A CASE OF FIRST IMPRESSION IN THE COMMONWEALTH?
>
> D. WERE TRIAL ATTORNEYS INEFFECTIVE FOR NOT OBJECTING TO THE DA EXPRESSING HIS OPINION, DIRECTLY AND INDIRECTLY, THAT APPELLANT WAS GUILTY OF MURDERING HIS WIFE DURING HIS CLOSING ARGUMENT?
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> E. WERE TRIAL ATTORNEYS INEFFECTIVE IN A CUMULATIVE MANNER IF TWO OR MORE OF THE ABOVE ERRORS ARE RULED HARMLESS?

Appellant's Brief at 2 (verbatim).

Our standard of review for an order denying PCRA relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Phillips***, 31 A.3d 317, 319 (Pa. Super. 2011), *appeal denied*, 42 A.3d 1059 (Pa. 2012) (citing ***Commonwealth v. Berry***, 877 A.2d 479, 482 (Pa. Super. 2005)). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id***. (citing ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001)).

It is undisputed that a PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition. ***Commonwealth v. Murray***, 753 A.2d 201, 203 (Pa. 2000). A judgment of sentence "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).

However, an untimely petition may be received when the petition alleges, and the petitioner proves, that any of the three limited exceptions to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.[1] A petition invoking one of these exceptions must be filed within sixty days of the date the claim could first have been presented. 42 Pa.C.S.A. § 9545(b)(2). In order to be entitled to the exceptions to the PCRA's one-year filing deadline, "the petitioner must plead and prove specific facts that demonstrate his claim was raised within the sixty-day time frame" under section 9545(b)(2). ***Carr***, 768 A.2d at 1167.

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[1] The exceptions to the timeliness requirement 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;
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> (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.A. § 9545(b)(1)(i), (ii), and (iii).

Our review of the record reflects that Appellant's judgment of sentence became final on November 15, 2006, ninety days after the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal and the time for filing a petition for review with the United States Supreme Court expired. ***See*** 42 Pa.C.S.A. § 9545(b)(3); U.S.Sup.Ct.R. 13. Appellant did not file the instant PCRA petition until September 8, 2011. Thus, the instant PCRA petition is patently untimely.

As previously stated, if a petitioner does not file a timely PCRA petition, his petition may be received under any of the three limited exceptions to the timeliness requirements of the PCRA. 42 Pa.C.S.A. § 9545(b)(1). If a petitioner asserts one of these exceptions, he must file his petition within sixty days of the date that the exception could be asserted. 42 Pa.C.S.A. § 9545(b)(2).

The record reflects that Appellant attempted to raise, in the instant PCRA petition, the timeliness exception alleging the facts upon which his claim is predicated were previously unknown to Appellant, 42 Pa.C.S.A. § 9545(b)(1)(ii). Specifically, Appellant asserted in the instant *pro se* PCRA petition that his previous PCRA counsel was essentially ineffective for failing to present this Court with an effective appellate brief, thereby resulting in this Court, although addressing many of Appellant's claims raised on appeal, rejecting as waived several of the issues Appellant had sought to have

reviewed. Appellant requested in his *pro se* PCRA petition the reinstatement of his appellate rights *nunc pro tunc*, based upon PCRA counsel's alleged ineffectiveness.

In ***Commonwealth v. Bennett***, 930 A.2d 1264 (2007), our Supreme Court ruled that where PCRA counsel abandons his client for purposes of appeal, that abandonment may constitute a newly discovered "fact" pursuant to section 9545(b)(1)(ii) if the abandonment was unknown to the petitioner during the PCRA filing period and could not have been ascertained by due diligence during that time. ***Id***. at 1174. In ***Bennett***, our Supreme Court made clear that "abandonment" refers to a "complete denial of counsel," such as a failure to file a requested appeal. ***Id***. at 1273. In this regard, the Supreme Court distinguished between situations where "counsel has narrowed the ambit of appellate review by the claims he has raised or foregone versus those instances, as here, in which counsel has failed to file an appeal at all." ***Id***. at 1272. Only the latter situation constitutes a "complete denial of counsel" and thus an incidence of abandonment under ***Bennett***. The former situation does not constitute abandonment, as it merely represents a circumstance in which counsel chooses among non-frivolous claims and selects the best issues for purposes of appeal. ***Id***. at 1273.

The Court in ***Bennett*** stated the following:

> There is no federal constitutional mandate requiring collateral review. ***Pennsylvania v. Finley***, 481 U.S. 551, 556-57, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). It is not part of the criminal process, and is, in fact, civil in nature. ***Id.*** Therefore, under the Fourteenth Amendment to the United States Constitution, the procedural due process protections are less stringent than for purposes of either a criminal trial or direct appeal. ***Id.*** Nevertheless, due process requires that the post conviction process be fundamentally fair. ***Id.***; ***see also Commonwealth v. Haag***, 570 Pa. 289, 809 A.2d 271, 283 (2002). Thus, petitioners must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner. ***See Logan v. Zimmerman Brush Co.***, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).
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> As part of the PCRA process, indigent petitioners may apply for the assistance of counsel for purposes of their first PCRA petition. We have held this rule to be absolute inasmuch as we have concluded that a petitioner need not establish that his petition is timely before he or she is entitled to the appointment of counsel. ***See***, ***e.g.***, ***Commonwealth v. Smith***, 572 Pa. 572, 818 A.2d 494 (2003). To this end, it can be assumed that the PCRA court will appoint appropriate counsel, *i.e.*, counsel that can and will raise potentially meritorious claims. In this same vein, while the performance of PCRA counsel is not necessarily scrutinized under the Sixth Amendment, the performance of counsel must comply with some minimum norms, which would include not abandoning a client for purposes of appeal. ***See***, ***e.g.***, ***Commonwealth v. Albrecht***, 554 Pa. 31, 720 A.2d 693 (1998); ***see also*** Pa.R.Crim.P. 904(F)(2) (providing for the appointment of counsel throughout postconviction proceedings including any appeal).

Bennett, 930 A.2d at 1273-1274.

Likewise, we are aware of our Supreme Court's decision in ***Commonwealth v. Reaves***, 923 A.2d 1119 (Pa. 2007), which narrowed the scope of cases permitting a finding of prejudice *per se*. Specifically, the Court in ***Reaves*** stated:

> [T]his Court stressed the fundamental difference between a lapse by counsel which leads to no review at all and one which merely narrows the review made available: "The difference in degree between failures that completely foreclose appellate review, and those which may result in narrowing its ambit, justifies application of the presumption [of prejudice] in the more extreme instance."

Id. at 1128 (quoting ***Commonwealth v. Halley***, 870 A.2d 795 (Pa. 2005)).

More recently, in ***Commonwealth v. Reed***, 971 A.2d 1216, 1226 (Pa. 2009), our Supreme Court explained that the filing of an appellate brief, deficient in some aspect or another, does not constitute a complete failure to function as a client's advocate so as to warrant a presumption of prejudice and the granting of a *nunc pro tunc* appeal. Thus, the Court in ***Reed*** refused to classify that case, where counsel filed a defective brief on direct appeal, as one entitled to a finding of prejudice *per se*, because the defective brief "did not deprive [the petitioner] of his constitutional right to appeal." ***Id***.

Our review of the record reflects that Appellant's first PCRA counsel did not abandon Appellant, as contemplated under the law set forth above, because PCRA counsel did not prevent Appellant from perfecting an appeal with this Court. Indeed, our review of the record indicates that PCRA counsel did file a PCRA claim and appellate brief with this Court on Appellant's behalf. This Court addressed many of Appellant's PCRA appellate issues in a twenty-three page memorandum decision. Thus, although PCRA

counsel failed to adequately brief particular issues on appeal, this did not constitute an abandonment under ***Bennett***, ***Reaves***, or ***Reed***. Hence, we cannot conclude that Appellant's claims with regard to his PCRA counsel's defective representation would form the basis for establishing an exception to the PCRA's timeliness requirements.

Even if we were to assume, for the sake of argument, that ineffective appellate advocacy is the type of "fact" which constitutes an exception under section 9545(b)(1)(ii), we are left to observe that Appellant has failed to expressly indicate when he discovered the "fact" that PCRA counsel filed a brief with this Court that was defective in part, or to allege that he exercised due diligence. In ***Commonwealth v. Stokes***, 959 A.2d 306 (Pa. 2008), our Supreme Court reiterated that compliance with the sixty-day rule is mandatory in order to invoke an exception to the PCRA timeliness requirements, which "requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence." ***Id***. at 310 (citation omitted).

Our review of the record reflects that Appellant, in his *pro se* PCRA petition, indicated that the appellate brief was filed with this Court by PCRA counsel on October 21, 2010. Second PCRA Petition, 9/8/11, at 6. Appellant also indicated that on February 23, 2011, his PCRA counsel withdrew his representation of Appellant and counsel's son entered his

appearance on Appellant's behalf that same day. ***Id***. Appellant further stated in his *pro se* PCRA petition that on March 15, 2011, he had a telephone conversation with PCRA counsel regarding why counsel had withdrawn his representation and counsel expressed that his failing health was interfering with his effective practice of law. ***Id***.

Our further review of the record reflects that on June 21, 2011, a panel of this Court authored a twenty-three page memorandum decision addressing many of the issues presented on appeal in Appellant's first PCRA petition, but finding some of the issues to be waived. On July 5, 2011, Appellant filed a petition for reargument with this Court, which was denied on September 2, 2011. Again, the instant PCRA petition was filed on September 8, 2011. However, our review of the record reflects that Appellant's *pro se* PCRA petition is devoid of any discussion regarding the sixty-day rule, or the exercise of due diligence. Accordingly, we are constrained to conclude that Appellant has failed to establish that he satisfied the sixty-day rule, that the information he relied upon in filing the instant *pro se* PCRA petition could not have been obtained earlier by the exercise of due diligence. 42 Pa.C.S.A. § 9545(b)(2); ***Stokes***, 959 A.2d at 310.

Thus, we are constrained to conclude that the PCRA court lacked jurisdiction to address the merits of the instant PCRA petition. ***See***

Commonwealth v. Fairiror, 809 A.2d 396, 398 (Pa. Super. 2002) (holding that PCRA court lacks jurisdiction to hear untimely petition). Likewise, we lack jurisdiction to reach the merits of the appeal. ***See Commonwealth v. Johnson***, 803 A.2d 1291, 1294 (Pa. Super. 2002) (holding that Superior Court lacks jurisdiction to reach merits of appeal from untimely PCRA petition).

Order affirmed.

Judgment Entered.

Deputy Prothonotary

Date: 9/10/2013