

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : No. 503 CR 1997
 :
 THOMAS JONES, :
 Defendant/Appellant :

MEMORANDUM OPINION

Serfass, J. - February 20, 2013

Defendant Thomas Jones (hereinafter "Defendant") has appealed from our Order dated October 26, 2012¹ dismissing his "Motion for Post-Conviction Collateral Relief," which was filed on September 19, 2012. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925 and recommend that our Order of October 26, 2012 be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was convicted on August 11, 1998 of four (4) counts of Involuntary Deviate Sexual Intercourse,² two (2) counts of Statutory Sexual Assault,³ two (2) counts of Indecent Assault⁴

¹ Defendant's Notice of Appeal indicates that the appeal is taken from an order entered on October 2, 2012; however, the order referenced by Defendant was, in fact, the notice of our intent to dismiss Defendant's petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure No. 907. This notice granted Defendant twenty (20) days within which to respond to the proposed dismissal as per Pennsylvania Rule of Criminal Procedure 907(1). Defendant did not respond to the notice and, on October 26, 2012, we entered an Order dismissing his petition. We understand Defendant's appeal to be taken from that dismissal Order, and not from the notice of intent to dismiss.

² 18 Pa. Cons. Stat. Ann. 3123 (1).

³ 18 Pa. Cons. Stat. Ann. 3122.1.

and one count of Corruption of Minors.⁵ Defendant has filed two (2) prior petitions for post-conviction collateral relief (hereinafter "PCRA petitions"). The first, which was filed on September 4, 2001, was denied by then-President Judge Richard W. Webb, who presided over Defendant's trial, and who set forth the factual background of this case more fully in a Memorandum Opinion and an Amended Opinion filed on September 3, 2002 and November 21, 2002, respectively. Defendant appealed that denial to the Superior Court, where it was affirmed on May 8, 2003.

Defendant filed his second PCRA petition on June 9, 2005. Judge Webb (by this time a senior judge) denied that petition on June 13, 2005 on the basis of untimeliness and because it raised claims which had been previously litigated, and on July 12, 2005, Defendant again appealed to the Superior Court. Senior Judge Webb filed a Memorandum Opinion explaining the denial on August 10, 2005. The Superior Court affirmed on February 6, 2006.

On September 9, 2009, Defendant filed a "Motion to Modify Sentence Nunc Pro Tunc," which Senior Judge Webb denied without hearing on September 21, 2009. Defendant filed a second "Motion to Modify Sentence Nunc Pro Tunc" on July 5, 2012, which this Court also denied without hearing. On September 19, 2012,

⁴ 18 Pa. Cons. Stat. Ann. 3126.

⁵ 18 Pa. Cons. Stat. Ann. 6301.

Defendant filed the instant PCRA petition, incorporating the same allegations contained within his second "Motion to Modify Sentence Nunc Pro Tunc." We gave notice of this Court's intent to dismiss the PCRA petition on October 2, 2012, allowing Defendant twenty (20) days within which to respond to the proposed dismissal. Defendant did not file a direct response and we dismissed the PCRA petition on October 26, 2012. Defendant filed his Notice of Appeal with the Superior Court on October 25, 2012 and with this Court on October 29, 2012.

DISCUSSION

Defendant's "Petition for Review" raises three grounds which, he claims, require that our Order be set aside, to wit, that the undersigned had no authority to dismiss his "Motion to Modify Sentence Nunc Pro Tunc," that Senior Judge Webb and the District Attorney are respondents in Defendant's PCRA petition and that Defendant's "Motion to Modify Sentence Nunc Pro Tunc" asks for the recusal of Judge Webb because of a conflict of interest. On the standard "Motion for Post Conviction Collateral Relief" form CD-198, Defendant set forth the grounds for his PCRA petition claiming, as in his "Motion to Modify Sentence Nunc Pro Tunc," that his court-appointed attorney as well as the District Attorney and Judge Webb "violated the elements of prejury (sic) also violated the Rules of Professional Conduct also violated the Code of Civility also

violated the Code of Judicial Conduct also violated the Commonwealth of Pennsylvania Constitutional Amendment at the sentencing proceedings." Further, Defendant alleges that counsel and the Court abused their discretion at the sentencing proceedings. Defendant does not specify how this occurred.

We submit that, as was the case with Defendant's second PCRA petition, discussion of the issue of timeliness is sufficient to dispose of the instant PCRA petition. Generally, all petitions for collateral relief, including second or subsequent petitions, must be filed within one year of the date the judgment of sentence became final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition is met. See Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 783 (Pa. 2000).

The Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46, provides, in pertinent part, as follows:

(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
the court to apply retroactively.

42 Pa.C.S.A. § 9545 (b) (1) (i - iii); see also
Commonwealth vs. Beasley, 741 A.2d 1258, 1260-61 (Pa.
1999).

Judgment in Defendant's case was final as of February 1,
2001, which was ninety (90) days after the Pennsylvania Supreme
Court denied his direct appeal and thus the end of his
opportunity to file a petition for writ of certiorari to the
United States Supreme Court. Therefore, Defendant could have
filed a PCRA petition no later than February 1, 2002 which was
one year from the date the judgment became final. The instant
PCRA petition was filed on September 19, 2012, more than ten
years beyond the date by which a PCRA petition could be timely
filed and more than six years after the date of his second PCRA
petition, which was itself dismissed for untimeliness.

As was the case with Defendant's second PCRA petition,
therefore, Defendant is barred from raising his claims unless he
demonstrates that one of the exceptions set forth hereinabove
applies to this case. Any PCRA petition invoking one or more of
these exceptions "shall be filed within 60 days of the date the

claim could have been presented.” 42 Pa.C.S.A. § 9545(b)(2). However, as was the case with Defendant’s second PCRA petition, Defendant invokes the after-discovered evidence and after-recognized constitutional right exceptions as well as the government official obstruction exception, in boiler plate fashion only. With regard to the after-discussed evidence exception, Defendant never states what his new evidence is, nor does he identify a particular case that gives rise to any after-recognized constitutional right. In the case of an after-recognized constitutional right, the Superior Court has held that the 60-day period begins to run upon the date of the underlying judicial decision. See Commonwealth v. Baldwin, 789 A.2d 728, 730-31 (Pa. Super 2001). Defendant’s contention that the failure to raise his claim previously was the result of interference by government officials must also fail. Not only does Defendant fail to articulate how any government official interfered with his appellate rights, he also fails to set forth why such claims could not have been raised at any time during the course of the last ten years. Untimeliness with respect to a PCRA petition is a jurisdictional deficiency, and where a petition is not timely filed and no exception applies, the court is without authority to hear the petition. Commonwealth v. Cruz, 578 Pa. 325, 334-35, 852 A.2d 287, 292 (2004). Because neither Defendant’s “Petition for Review” nor the “Motion to

Modify Sentence Nunc Pro Tunc" attached thereto makes any credible claim that any of the three exceptions to the time bar apply, Defendant's PCRA petition was untimely filed and we respectfully request that our Order of October 26, 2012 be affirmed on that basis.

We also submit that Defendant's allegations are without merit. Defendant's first claim, that this Court lacked authority to dismiss his "Motion to Modify Sentence Nunc Pro Tunc" because the undersigned had not previously issued an opinion on the matter, was waived when Defendant failed to appeal our Order of Court dismissing that motion. Pursuant to 42 Pa.C.S.A. § 5571, an appeal must be commenced within thirty (30) days after the entry of the order from which the appeal is taken. Our order dismissing Defendant's motion was entered on July 25, 2012. The instant appeal was commenced in the Superior Court on October 25, 2012, two (2) months after the last date on which an appeal from our order of dismissal could properly have been taken. Consequently, the issue is waived and Defendant may not raise it in the instant appeal.

With respect to the remaining issues raised directly by Defendant's appeal: specifically, that Senior Judge Webb and the District Attorney are respondents in the instant PCRA petition; that Defendant has requested the recusal of Senior Judge Webb; and those claims which are incorporated in his appeal through

the "Motion to Modify Sentence Nunc Pro Tunc" regarding unspecified violations of the Rules of Professional Conduct, the Code of Civility, the Code of Judicial Conduct and the Pennsylvania Constitution, we submit that there is no cognizable right to PCRA relief raised by any of these claims.

CONCLUSION

While Defendant indicates in the instant PCRA petition that his cause of action is grounded in Constitutional violations which undermined the truth determining process, improper obstruction by government officials, and the recent discovery of exculpatory evidence, as was the case with Defendant's second PCRA petition, Defendant fails to identify the manner in which his claims meet any of those criteria. The burden was on Defendant to demonstrate that he was entitled to relief, and he failed to do so. A PCRA court may decline to hold a hearing on the petition if the 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, 1014 (Pa. Super. 2001). Even if Defendant's claims were not untimely raised, we would nonetheless find them to be without merit as there is no evidentiary support for any such claims.

Based upon the foregoing, we respectfully recommend that our October 26, 2012 Order denying Defendant's third PCRA petition be affirmed.

BY THE COURT:

Steven R. Serfass, J.