

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

VANCE WALKER

Appellant

No. 1167 WDA 2013

Appeal from the PCRA Order July 2, 2013
In the Court of Common Pleas of Beaver County
Criminal Division at No: CP-04-CR-0000801-1996

BEFORE: FORD ELLIOTT, P.J.E., BOWES, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED FEBRUARY 11, 2014

Vance Walker (“Walker”) challenges the July 2, 2013 order dismissing his petition for relief under the Post-Conviction Relief Act (“PCRA”), 42 Pa.C.S. §§ 9541-46. We affirm.

In a previous memorandum, we set forth the factual and procedural history of this case as follows:

The charges in this case arose from the execution of a search warrant at the alleged residence of [Walker] at 1515 Elgin Street, Aliquippa, on May 5, 1994. Agent Barbara Garrett of the Office of the Attorney General, Bureau of Narcotics Investigation and Drug Control, testified at trial that she was part of the investigation of this residence that led to Walker’s arrest and the seizure of multiple baggies [containing] cocaine residue with the corners cut off. Agent Garrett described to the jury that drug traffickers commonly package cocaine for sale by placing it in the corners of the baggies. The affidavit of probable cause filed to obtain the search warrant for 1515 Elgin Street included a description of events leading to [Walker’s] prior arrest on February 23, 1993, by Pittsburgh police for possession of crack

cocaine and possession with intent to deliver crack cocaine, drug paraphernalia and criminal conspiracy.

Before the execution of the search warrant in the case before us, surveillance was done on the home and several trash collections were conducted by law enforcement. Certain documents were found in the trash, including two utility envelopes addressed to [Walker] at 1515 Elgin Street, Aliquippa. Agent Garrett also testified that during her surveillance of the home prior to execution of the search warrant, she observed [Walker] park his car in the garage, enter the home without knocking and, soon after, turn on a light in an upstairs bedroom of the residence.

During the execution of the search warrant, agents found documents in the name of or addressed to "Vance Walker," at the Elgin Street address, including bank statements, a veterinary bill and personal letters, throughout the house. The agents also found "owe sheets," which Agent Garrett testified are lists of drug debts, in the house. Agent Garrett noted that the back of the veterinary bill addressed to Walker had been used as an owe sheet. Inside the house, agents also found a man's jacket containing \$11,730 in cash, and \$2,145 was found on the living room floor. A loaded Smith and Wesson .22 caliber hand gun, previously reported as stolen from a Beaver Falls residence, was found in a kitchen cupboard. Agents also found 151 grams of cocaine and a small digital scale in a paper bag on top of the overhead garage door adjacent to the house. The same vehicle [Walker] was observed driving the night surveillance was conducted was parked in the garage. Two bottles of Inositol, a known cutting agent for cocaine, were found in the kitchen and upstairs bathroom of the home, respectively.

Agents also recovered the lease for the rental of the property from the owner, Steven Colbert. It was determined that Colbert was not living in the residence at the time of the search. Agents also found an agreement of sale between Colbert and [Walker] for the residence. At trial, Christine Waugh, an employee of the rental agent for the property, testified that on February 23, 1994, she had met with [Walker], Steven Colbert and Colbert's girlfriend. It had been her understanding that the three of them would be living there, but on a subsequent home inspection, she noted that only one bedroom was being used as a bedroom and the other two were being used for storage of clothing and weightlifting equipment. Waugh further testified that she telephoned the residence several times to complain about dogs

being kept there and that each time she called, [Walker] answered the telephone or she reached the answering machine. During her visits to the premises, only [Walker] was there. When agents executed the search warrant, [Walker] and his brother, Dodd Walker, were present inside the home. In addition to the drugs and paraphernalia mentioned above, agents seized 14 pieces of crack cocaine from Dodd Walker.

On February 12, 1997, a jury convicted [Walker] of possession with intent to deliver a controlled substance^[1] and receiving stolen property.^[2] Thereafter, he was sentenced to seven to fourteen years['] imprisonment. Trial counsel, Paul Gettleman, Esquire, appealed the judgment of sentence to this court, which affirmed the conviction and sentence. **Commonwealth v. Walker**, No. 482 Pittsburgh 1997 (Pa. Super. May 18, 1998) (unpublished memorandum). On September 23, 1998, our Supreme Court denied Walker's petition for allowance of appeal.

Commonwealth v. Walker, 1101 WDA 2000, slip op. at 1-4 (Pa. Super. June 4, 2001) (citation modified).

On December 10, 1999, Walker filed a petition for relief under the PCRA. On May 12, 2000, the PCRA court held an evidentiary hearing. On June 1, 2000, the petition was denied. Walker appealed, and we affirmed the PCRA court's denial of post-conviction relief on June 4, 2001. *Id.* at 1, 10. On March 22, 2002, the Supreme Court of Pennsylvania denied Walker's petition for allowance of appeal. **Commonwealth v. Walker**, 796 A.2d 982 (Pa. 2002) (*per curiam*).

¹ 35 P.S. § 780-113(a)(30).

² 18 Pa.C.S. § 3925.

On August 8, 2012, Walker filed his second PCRA petition. On September 12, 2012, the PCRA court, pursuant to Pa.R.Crim.P. 907(1), served Walker with a notice of the court's intention to dismiss his petition without hearing, after determining that Walker's petition was untimely.

On October 3, 2012, after Walker did not file a written response within twenty days of the notice, the PCRA court, dismissed the petition without a hearing, for the reasons it previously had set forth in its "Preliminary Order and Notice of the Court" dated September 12, 2012. Walker filed "A Motion to Supplement Second Petition for PCRA" on April 12, 2013, which the PCRA court denied on April 23, 2013. Walker then filed a "Third Layered Post-Conviction Relief Petition" on June 3, 2013. On June 4, 2013, the court issued a "Preliminary Order and Notice of Court" notifying Walker of the court's intention to dismiss his petition without hearing, again finding the petition to be untimely. On June 25, 2013, Walker filed a written response to the court's notice. On July 2, 2013, the PCRA court dismissed Walker's third PCRA petition.

On July 18, 2013, Walker filed a notice of appeal. On July 19, 2013, the trial court issued a Pa.R.A.P. 1925(a) opinion.³ Therein, the court

³ The PCRA court's Rule 1925(a) opinion was issued even though the court did not direct Walker to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Nonetheless, even though he was not ordered to do so, Walker filed a concise statement on August 5, 2013, seventeen days after the PCRA court issued its opinion.

adopted its analysis from its September 12, 2012 “Preliminary Order and Notice of the Court” and June 4, 2013 “Preliminary Order and Notice of Court.”

Walker raises two issues for this Court’s consideration:

- I. DID THE PCRA COURT [ERR] WHEN IT FAILED TO GRANT AN EVIDENTIARY HEARING WHEREIN APPELLANT COULD HAVE ESTABLISHED AFTER[-]DISCOVERED EVIDENCE WHICH ENTITLED HIM TO RELIEF FROM AN ILLEGAL SENTENCE?
- II. SHOULD AN ILLEGAL SENTENCE ALWAYS BE SUBJECT TO APPELLATE REVIEW?

Brief for Walker at 3 (punctuation modified).

The “standard of review for an order denying post-conviction relief is limited to whether the record supports the post-conviction court’s determination, and whether that decision is free of legal error.” ***Commonwealth v. Johnson***, 945 A.2d 185, 188 (Pa. Super. 2008). The PCRA court’s findings “will not be disturbed unless there is no support for the findings in the certified record.” ***Id.***

Walker argues that his seven to fourteen-year prison sentence, which was an enhanced sentence for a second drug conviction under 35 P.S. § 780-115, was illegal. Specifically, Walker alleges that no evidence was presented to the court to prove that he had a second or subsequent drug offense at the time that he committed the instant offense. Before we address Walker’s substantive claim, we first must determine whether Walker’s PCRA petition was timely, an issue that implicates our jurisdiction.

In ***Commonwealth v. Jackson***, we articulated the timeliness standards under the PCRA as follows:

The PCRA “provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.” 42 Pa.C.S.A. § 9545. When an action is cognizable under the PCRA, the PCRA is the “sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose[.]” 42 Pa.C.S.A. § 9542.

In order for a court to entertain a PCRA petition, a petitioner must comply with the PCRA filing deadline. **See *Commonwealth v. Robinson***, 837 A.2d 1157, 1161 (Pa. 2003). The time for filing a petition is set forth in 42 Pa.C.S.A § 9545(b), which provides 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 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.

* * *

42 Pa.C.S.A § 9545(b).

“[T]he time limitations pursuant to . . . the PCRA are jurisdictional.” **Commonwealth v. Fahy**, 737 A.2d 214, 222 (Pa. 1999). “[Jurisdictional time] limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits.” **Id.** “If the petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition.” **Commonwealth v. Perrin**, 947 A.2d 1284, 1285 (Pa. Super. 2008).

Commonwealth v. Jackson, 30 A.3d 516, 518-19 (Pa. Super. 2011), *appeal denied*, 47 A.3d 845 (Pa. 2012).

Walker’s judgment of sentence was imposed on March 3, 1997. He filed a direct appeal to this Court, and, on May 18, 1998, we affirmed the judgment of sentence. Walker filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on September 22, 1998. After that denial, Walker had ninety days, or until on or about December 21, 1998, to file a petition for *certiorari* with the United States Supreme Court. U.S. Sup. Ct. Rule 13. Because he did not do so, Walker’s judgment of sentence became final after those ninety days elapsed. 42 Pa.C.S. § 9545(b)(3). Thus, he had one year from December 21, 1998, to file a petition under the PCRA. **Id.** § 9545(b)(1). Any PCRA petition filed after December 21, 1999, facially is untimely, and, unless an exception enumerated in 42 Pa.C.S. § 9545(b)(1) applies, this Court lacks jurisdiction to hear this case. **See Perrin, supra.** On June 3, 2013, Walker filed his third PCRA petition, over thirteen years past the statutory deadline. Therefore, that petition facially is untimely.

Presently, Walker argues that his petition should not be deemed untimely, for two reasons. First, Walker asserts that he has satisfied the newly-discovered fact exception to the PCRA's time-bar. **See Jackson**, 30 A.3d at 518-19; 42 Pa.C.S. § 9545(b)(1)(ii). Walker maintains that the trial court incorrectly found his instant conviction to be his second offense under 35 P.S. § 780-115, and that he should have received a prison sentence of five to ten years, rather than seven to fourteen years. Walker claims that he was unaware of the proper definition of "second or subsequent offense" until "he was reviewing the possible sentencing in an unrelated case on June 27, 2012." **See** Second Petition for Post-Conviction Relief at 5 ¶19. He argues that his discovery of this definition constitutes a newly-discovered fact under 42 Pa.C.S. § 9545(b)(1)(ii). Therefore, he argues, this Court has jurisdiction over his untimely claim.

We previously have addressed an argument similar to the one that Walker now presents:

Our Supreme Court has held for purposes of 42 Pa.C.S. § 9545(b)(1)(ii) information is not "unknown" to a PCRA petitioner when the information was a matter of public record. For purposes of the exception to the PCRA's jurisdictional time-bar under [subsection] 9545(b)(1)(ii), a petitioner fails to meet his burden when the facts asserted were merely unknown to him. A petitioner must also explain why his asserted facts could not have been ascertained earlier with the exercise of due diligence.

Commonwealth v. Taylor, 933 A.2d 1035, 1040-41 (Pa. Super. 2007).

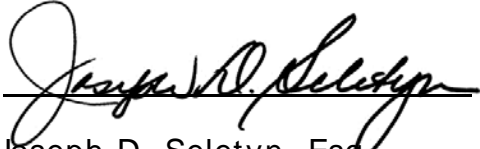
The definition of “second or subsequent offense” under Pennsylvania’s Controlled Substance Act is a matter of public record. Through the exercise of due diligence, Walker could have determined that definition on or before December 21, 1999. Consequently, Walker has not satisfied the newly-discovered fact exception to the PCRA’s jurisdictional time-bar.

Second, Walker argues that an illegal sentence claim can never be waived. This is true. Yet, the fact that Walker’s claims are not waived does not mean that we have jurisdiction over them. Waiver and jurisdiction are separate matters. Although “not technically waivable, a legality [of sentence] claim may nevertheless be lost should it be raised for the first time in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim.” ***Commonwealth v. Slotcavage***, 939 A.2d 901, 903 (Pa. Super. 2007) (citing ***Commonwealth v. Fahy***, 737 A.2d 214, 223 (Pa. 1999) (“Although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA’s time limits or one of the exceptions thereto.”)). As we noted above, no exceptions to the PCRA’s timeliness requirements apply in this case. As such, we lack jurisdiction to review Walker’s legality of sentence claim, even though it is non-waivable.

Because both reasons proffered for timeliness in Walker’s third petition necessarily fail, Walker’s petition was untimely, rendering our courts without jurisdiction to review his third PCRA petition. Accordingly, the PCRA court did not err in dismissing Walker’s petition without hearing.

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: 2/11/2014