

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-412-2008
vs. :
 : CRIMINAL DIVISION
 :
 :
 :
 :
 : 1925(a) Opinion
GREGORY PACKER,
Appellant

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's order entered on March 9, 2016, which dismissed Appellant Gregory Packer's Post Conviction Relief Act (PCRA) petition as untimely. For the most part, the court would rely on its Opinion and Order issued on December 10, 2015, which gave Appellant notice of the court's intent to dismiss his PCRA petition as untimely. The court however, supplements that Opinion and Order as follows:

Court-appointed PCRA counsel and the court tried to explain to Appellant that he was required to show that his petition was timely. If he did not, the court would not have jurisdiction to review his issues, hold an evidentiary hearing, or grant him any relief. Instead, Appellant kept focusing on the merits of his issues, specifically his attorney's failure to file an appeal to the Pennsylvania Supreme Court, and the case law regarding mandatory minimum sentences.

In written correspondence, appointed counsel asked Appellant to provide any information that would show the petition was timely so that he could file an amended PCRA

petition on his behalf. When he did not, counsel filed a motion to withdraw and a 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).

The court conducted an independent review of the record and also determined that Appellant's petition was untimely. The court granted counsel's motion to withdraw, but gave Appellant another opportunity to show that his petition was timely in any response to the court's proposed dismissal. The court specifically told Appellant that he needed to allege facts and provide any documentation that would show when he requested trial counsel to file an appeal to the Pennsylvania Supreme Court, the efforts he took to determine the status of his requested appeal, when he discovered that the requested appeal had not been filed, and why through the exercise of diligence he could not have discovered that no appeal had been filed until he filed his PCRA petition in 2015.

In response to the proposed dismissal, on January 4, 2016 Appellant submitted approximately 2 ½ inches of paperwork with a cover sheet entitled "Brief for Appellant. Motion to modify and reduce sentence, and amended PCRA petition." Again, Appellant focused on the merits of his PCRA petition instead of its timeliness. He alleged that: counsel abandoned him; there were substantial issues of arguable merit; there would be no prejudice to the Commonwealth; and his failure to file timely post-sentence motions and an appeal to the Pennsylvania Supreme Court were "largely due to the ineffectiveness of counsel." Out of hundreds of pages of material (that predominantly consisted of copies or summaries of statutes, cases, and rules), Appellant submitted approximately 15 pages of material in Exhibit B that consisted of letters between Appellant and his counsel, letters between Appellant and his sister-in-law, and three-pages of docket entries for his case that were printed at 2:42 p.m.

on September 17, 2015 (several months after he filed his PCRA petition).

The court reviewed these documents prior to dismissing Appellant's petition. Rather than discuss these exhibits in numerical order, the court will review them in what appears to be their chronological order.

Exhibit B-1 is a letter dated June 4, 2009 to Appellant from Trisha Hoover, who at that time was the law clerk for Judge Butts. Apparently, Appellant wrote to Judge Butts regarding a desire to appeal his convictions, even though Judge Kieser presided over his trial. Ms. Hoover informed Appellant that his letter would be forwarded to his attorney, his case was scheduled for a post-sentence motion hearing on June 15, 2009 before Judge Kieser, and Appellant had to wait until after the decision on the post-sentence motion to file an appeal. Appellant was also advised that if he had any further questions to contact his attorney.

Trial counsel filed a direct appeal on or about June 26, 2009.

Exhibit B-8 is a letter dated September 28, 2009 to Appellant from his sister-in-law, Tammy Packer, in which she summarizes conversations she had with trial counsel on May 27, 2009 and September 28, 2009 about Appellant's post-sentence motions and his Superior Court appeal.

Exhibit B-9 is a letter dated December 14, 2009 to Appellant from his sister-in-law, Tammy Packer, in which she recounted a conversation she had with trial counsel on December 10, 2009. Counsel had informed her that Appellant's appeal was in the same place it was the last time she talked to trial counsel. Judge Kieser was in the process of completing his opinion for the appeal and then the Superior Court would issue a briefing schedule. Trial counsel reiterated that the appeal process is "a minimum of one year."

Exhibit B-3 is a letter from Trisha Hoover, who was now an assistant public defender, advising Appellant that trial counsel had left the public defender's office and she would be representing him on appeal.

Exhibit B-2 is a letter dated November 1, 2010 to Appellant from Ms. Hoover. Ms. Hoover advised Appellant that the Superior Court had affirmed his conviction and judgment of sentence, but remanded the case on an issue of the fine, which meant the trial court would either have to eliminate the fine or conduct a hearing as to whether the fine was appropriate. Ms. Hoover told Appellant to contact her if he had any questions.

Although the next three exhibits are undated, the court estimated their chronology based on their content.

Exhibit B-5 is an undated letter from Appellant to Ms. Hoover. Appellant stated that he received Ms. Hoover's letter and he had some questions. He asked whether she could file another appeal for him and whether he could get the trial transcripts.

Exhibit B-4 is another undated letter from Appellant to Ms. Hoover. Appellant indicated that he received a letter from Ms. Hoover on November 19. He stated he would like to appeal to the Supreme Court and he would like to get the trial transcripts.

On December 17, 2010, the court held a hearing and vacated the fine.

Exhibit B-6 is an undated letter from Appellant to the public defender's office. He asked whether there was any news about the appeal he requested and he noted that he hadn't received any transcripts yet. Although it was only a couple of months since he sent the letter asking to appeal, he wanted some kind of information.¹

¹ Although this letter could have been written in reference to Appellant's initial appeal to the Superior Court, the court assumed it related to his requested appeal to the Supreme Court for purposes of determining the timeliness of his petition.

Exhibit B-10 is a letter dated March 24, 2011 to Appellant from his sister-in-law, Tammy Packer. Ms. Packer asks Appellant how everything is going with the appeal process, because it was quite some time since she had talked to Appellant or the public defender's office.

Exhibit B-11 is a letter dated September 17, 2011 to Appellant from his sister-in-law, Tammy Packer, in which she again asks Appellant whether he has heard anything about his appeal yet.

Neither Exhibit B-10 or B-11 show any efforts Appellant or Tammy Packer took to determine the status of Appellant's appeal from his counsel or anyone else.

Exhibit B-7 is an undated letter from Appellant to the public defender's office. In the letter Appellant noted that it had been about a year since he sent a letter to Ms. Hoover asking her if he could appeal again, he hadn't heard anything from her or anyone else there and he had not received the trial transcripts. Based on the content of this letter, the court infers that it was sent sometime between October and December of 2011.

All of the letters appear to be from 2009 through 2011. The letters between 2009 and November 2010, however, related to the Superior Court appeal, not an appeal to the Pennsylvania Supreme Court. Although many of the letters tend to show that Appellant wanted his counsel to file an appeal to the Pennsylvania Supreme Court, they do not show

that his petition is timely. Instead, they show a gap of about 3 ½ years from roughly the end of 2011 until the filing of Appellant’s petition on June 8, 2015. Appellant failed to allege any steps that he took to determine the status of his appeal during this time period. Diligence demands that Appellant take reasonable steps to protect and further his interests.

Commonwealth v. Carr, 768 A.2d 1164, 1168 (Pa. Super. 2001). Based on Appellant’s own pleadings and the reasonable inferences that can be drawn therefrom, Appellant did not exercise diligence from the end of 2011 through the filing of his petition in 2015.

Furthermore, the mere fact that Appellant alleged that counsel was ineffective for failing to file his requested appeal does not save his petition from the PCRA’s timeliness requirements.

Id. Therefore, Appellant’s claims that counsel failed to file a requested appeal to the Pennsylvania Supreme Court are untimely.

Appellant’s claims regarding the illegality of his mandatory minimum sentences are also untimely. Appellant cannot avail himself of the exceptions contained in section 9545(b)(1)(i), because “government officials” do not include defense counsel, whether appointed or retained. 42 Pa.C.S. §9545(b)(4); *Commonwealth v. Pursell*, 749 A.2d 911, 916 (Pa 2000). Appellant also cannot avail himself of the exception contained in section 9545(b)(1)(ii), because the Pennsylvania Supreme Court has held that “subsequent decisional law does not amount to a ‘new’ fact under section 9545(b)(1)(ii) of the PCRA. *Commonwealth v. Watts*, 23 A.3d 980, 987 (Pa. 2011). Finally, neither *Alleyne* nor any of the decisions of the Pennsylvania appellate courts have held that those decisions apply retroactively, which is a requirement to invoke section 9545(b)(1)(iii). Moreover, Appellant did not file his petition within 60 days of the date those decisions were issued. Therefore, Appellant’s claims that his mandatory minimum sentences are illegal also are untimely.

The court and PCRA counsel repeatedly tried to get Appellant to understand that he first had to show that his claims were timely before the court could examine the merits of his claim or grant him any relief. Since Appellant did not plead sufficient facts to show that his petition was timely filed, the court lacked jurisdiction to address the substance of his claims.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Gregory Packer, JB2938
SCI-Fayette, PO Box 9999, LaBelle PA 15450
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)