IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-0000600-2008**
	:	
vs.	**:**	
	:	
WAYNE SHOWERS,	**:**	
Appellant	**:**	**1925(a) Opinion**

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, which dismissed Appellant Wayne Showers' second Post Conviction Relief Act (PCRA) petition without holding an evidentiary hearing.

By way of background, Appellant was charged with several sexual offenses against two minor females, A.T. and B.P. Following a trial on May 5-6, 2009, a jury convicted Appellant of aggravated indecent assault of a child and indecent assault of a child under 13 years of age with respect to victim, A.T., and statutory sexual assault, aggravated assault, and indecent assault with respect to victim, B.P. The incidents which formed the basis of these crimes occurred between May 2000 and August 2007. On August 11, 2009, the court sentenced Appellant to an aggregate term of imprisonment of 52 months to 180 months, which consisted of 36 to 120 months for aggravated assault of A.T. and 16 to 60 months for statutory sexual assault of B.P.

Appellant filed a direct appeal. Finding all appeal issues were waived, the Pennsylvania Superior Court affirmed Appellant's judgment of sentence on June 29, 2010. 1464 MDA 2009.

Appellant's direct appeal rights were reinstated through PCRA proceedings. The Pennsylvania Superior Court affirmed Appellant's judgment of sentence on July 2, 2014. See 884 MDA 2013. Appellant filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on January 21, 2015. Appellant did not file a petition for certiorari with the United States Supreme Court. Therefore, his judgment of sentence became final on April 21, 2015.

Appellant filed a PCRA petition, in which he asserted that (1) trial counsel was ineffective for not polling the jury; (2) the prosecutor committed prosecutorial misconduct by referring to him as a "child molester;" and (3) his minimum sentence was illegal pursuant to *Alleyne v. United States,*133 S.Ct. 2151 (U.S. 2013). The court appointed Donald Martino to represent Appellant. The court denied this PCRA petition on July 12, 2016. Appellant appealed, but the Pennsylvania Superior Court affirmed the denial of his PCRA petition on April 17, 2017. See 1201 MDA 2016. No petition for allowance of appeal was filed.

On December 27, 2017, the Lycoming County Public Defender filed a second PCRA petition on Appellant's behalf. In this petition, Petitioner asserted that, based on *Commonwealth v. Muniz*, 164 A.3d 1181 (Pa. 2017), retroactive application of SORNA's registration requirements to Appellant violated the ex post facto clauses of United State and Pennsylvania Constitutions. After the Superior Court issued its decision in *Commonwealth v. Murphy*, 180 A.3d 402 (Pa. Super. 2018), 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. 1998).

On July 18, 2018, Appellant filed another PCRA petition in which he claimed first PCRA counsel, Donald Martino, rendered ineffective assistance of counsel for failing to raise both the ineffectiveness of trial counsel and appellate counsel for not challenging the excessive sentence given to Appellant that reached the ceiling of the statutory maximum sentence allowable by law. Appellant claimed his petition was timely because he was asserting an ineffective assistance of counsel claim pursuant to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Appellant never requested leave of court to file his "new" PCRA petition while his second counseled PCRA petition was pending.

On September 21, 2018, the court gave Appellant notice of its intent to dismiss his PCRA petition without holding an evidentiary hearing. The court also entered a separate order permitting the Public Defender to withdraw from this case. The court dismissed Appellant's petition at the end of October 2018.

Appellant filed a notice of appeal. Appellant asserts the following issue on appeal:

> Did [PCRA] [c]ounsel, Donald Martino, Esq. render ineffective assistance of [c]ounsel for failure to raise both the ineffectiveness of [t]rial [c]ounsel, Robert Cronin, Esq., and Julian Allatt, Esq. when challenging the excessive sentence given to [Appellant] that reaches the ceiling of the statutory maximum allowable by law?

The court found that Appellant was not entitled to relief on this issue for several reasons. First and foremost, the court lacked jurisdiction to hold an evidentiary hearing or grant Appellant relief as his petition was patently untimely.

At the time the court denied Appellant's PCRA petition, section 9545(b) of the Judicial Code, which contains the time limits for filing a PCRA petition, stated:

> (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.
>
> (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.
>
> (4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. §9545(b). The time limits of the PCRA are jurisdictional in nature. *Commonwealth v. Howard*, 567 Pa. 481, 485, 788 A.2d 351, 353 (2002); *Commonwealth v. Palmer*, 814 A.2d 700, 704-05 (Pa.Super. 2002). "[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." *Commonwealth v Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Appellant's judgment of sentence became final on April 21, 2015. To be facially timely, Petitioner was required to file his PCRA petition on or before April 21, 2016. Appellant's petition which asserted this issue was not filed until July 18, 2018, over two years late.

Appellant's petition was also not filed within 60 days after the appeal of his first PCRA was completed. Mr. Martino ceased representing Appellant by May 17, 2017 at the latest. See Pa. R. Crim. P. 120(A)(4) (appointed counsel represents a defendant through appeal unless granted leave to withdraw by the court). Therefore, any claims of Mr. Martino's ineffectiveness should have been raised by July 17, 2017.

Furthermore, Appellant's reliance on *Martinez v. Ryan* is misplaced. This case does not create an exception to Pennsylvania's PCRA statute; if anything, it creates an exception to allow a federal court to consider the merits of a petition for habeas corpus that otherwise would have been procedurally defaulted.

Second, Superior Court decisions have held that discretionary aspects of sentencing claims are not cognizable under the PCRA. *Commonwealth v. Wrecks*, 934 A.2d 1287, 1289 (Pa. Super. 2007); *Commonwealth v. Fowler*, 925 A.2d 586, 593 (Pa. Super. 2007).

Third, even if such claims are cognizable under the PCRA, this claim was waived. "[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa. C.S.A. §9544(b). Not only could trial counsel have raised this claim at the time of Appellant's sentencing or in a post-sentence motion, but Appellant himself could have raised this issue in his first PCRA.[1] Appellant asserted three issues in his first pro se PCRA petition, including one challenging his minimum sentence pursuant to *Alleyne*, but Appellant never claimed that his maximum sentence was excessive.

Fourth, Appellant's claim lacks merit.

[1] Mr. Allatt could not have raised this issue on appeal, because it was not preserved at sentencing or in a post-

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009)(quoting *Commonwealth v. Hoch*, 936 A.2d 515, 517-518 (Pa. Super. 2007)).

Appellant asserted that prior counsel was ineffective for failing to file a motion for sentence reconsideration based on the "tainted" testimony of A.T. or to assert an ineffective assistance of counsel claim based on such. The court found that Appellant's argument missed the mark. "Taint" is not a basis to seek sentence reconsideration. It is an issue regarding the competency of the child witness to testify at trial. *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003).

A sentencing judge has the discretion to impose any maximum period of confinement up to the limit authorized by law. See 42 Pa. C.S.A. §9756(a). In this case, the aggravated indecent assault was a felony of the second degree.[2] The limit authorized by law for a felony of the second degree is ten years or 120 months.

The sentencing judge imposed a maximum sentence of 120 months for aggravated indecent assault. This sentence did not exceed the lawful maximum. Furthermore, Appellant has failed to reference anything in the record to establish that the

---

sentence motion. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R. App. P. 302(a).

[2] According to the affidavit of probable cause and the Commonwealth's theory at trial, the aggravated indecent assault against A.T. occurred in 2000 when A.T. was seven years old. Although the aggravated indecent assault was charged as a felony of the first degree, that grading did not exist for aggravated indecent assault prior to

sentencing judge abused its discretion in imposing these sentences. In fact, there is nothing in the record to establish that the sentencing judge exercised its judgment based on partiality, prejudice, bias, or ill will against Appellant. The evidence presented at trial upon which the jury based its verdict established that Appellant penetrated with his fingers the vagina of a seven year old child. Given the nature and seriousness of this offense, it was not an abuse of discretion to impose a maximum sentence equal to the limit authorized by law.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Wayne Showers, #JF0015
SCI Rockview, Box A, 1 Rockview Place, Bellefonte PA 16823
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

2002.