

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CP-41-CR-000055-2001;
	: CP-41-CR-000284-2001;
vs.	: CP-41-CR-000285-2001;
	: CP-41-CR-000286-2001;
	: CP-41-CR-000586-2001;
	: CP-41-CR-000681-2001;
	: CP-41-CR-000825-2001;
TIMOTHY HARMAN,	: CP-41-CR-000828-2001;
Appellant	: CP-41-CR-000862-2001;
	: CP-41-CR-000863-2001;
	: CP-41-CR-001017-2001;
	: CP-41-CR-001079-2001;
	: CP-41-CR-001160-2001;
	: CP-41-CR-001478-2001
	: 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 dated July 23, 2024 and docketed on July 24, 2024 that denied Appellant Timothy Harman's motion to reinstate appeal rights nunc pro tunc, which the court treated as a Post Conviction Relief Act (PCRA) petition.

Factual Background

On November 15, 2001, Appellant entered a guilty plea to one count of burglary in each of the fourteen above-captioned cases. On February 5, 2002, the court imposed an aggregate sentence of 28 -54 years' incarceration in a state correctional institution. Harman, through his public defender, filed a timely motion to reconsider sentence, which the court denied on or about February 22, 2002. Harman advised his attorney after sentencing that he

wished to appeal. His attorney acknowledged this desire, but never filed a notice of appeal on Harman's behalf.

On November 24, 2003, Harman filed a pro se PCRA petition in case 823-2001. The court appointed counsel for Harman on December 5, 2003. Harman asserted three (3) issues: (1) that his PCRA Petition was not untimely because he was moved from prison to prison and was unable to communicate with his attorney; (2) counsel failed to properly prepare for the sentencing hearing and to present mitigating circumstances; (3) counsel told the Defendant that he would receive a sentence that was different than the one he actually received. On February 4, 2004, the court issued an order giving Harman notice of the court's intent to dismiss his PCRA petition as untimely. On April 29, 2004, the court issued an opinion and order dismissing Harman's PCRA petition as untimely.

On June 25, 2008, Harman filed a petition for writ of habeas corpus in case 823-2001. The court treated this petition as a second PCRA petition and dismissed it as untimely. Harman filed an appeal. The Superior Court affirmed the court's dismissal on or about August 7, 2008. See *Commonwealth v. Harman*, J-S14028-09, 1201 MDA 2008 (Pa. Super. Aug. 7, 2008). The Pennsylvania Supreme Court denied Harman's petition for allowance of appeal on October 26, 2009.

On April 20, 2012, Harman filed another pro se PCRA petition. The court considered this Petition as Harman's third PCRA petition.¹ The court entered an opinion and order on

¹ This was the third petition filed in case 823-2001. It may have been the first petition filed in Harman's other cases.

November 8, 2012, giving Harman notice of the court's intent to dismiss his petition as untimely. On December 3, 2012, the court dismissed this PCRA petition.

On May 22, 2024, Harman filed a Motion to Reinstate Right to Appellate Review Nunc Pro Tunc. Although Harman noted that he received a letter from counsel dated July 18, 2002 incorrectly advising Harman that his post-sentence motion was still pending, Harman failed to state any reasons why his Motion was filed **decades** after his deadline to file an appeal expired or why he failed to assert these claims in his prior PCRA petitions. On May 31, 2024, the court entered an opinion and order in which it treated Harman's Motion as a PCRA petition and gave him notice of the court's intention to dismiss it as untimely.

On June 14, 2024, Harman filed a response to the court's proposed dismissal. Harman asserted that his petition should be considered timely. He contended that his public defender should be considered a governmental official who interfered with his right to appeal and that the court interfered with his constitutional right to counsel by failing to appoint counsel for Harman's first PCRA petition filed in 2012.

On July 24, 2024, the court entered an opinion and order addressing Harman's response and dismissing his Motion without holding an evidentiary hearing.

On August 22, 2024, Harman filed a notice of appeal in cases 1079-2001, 1160-2001, and 1478-2001. On August 27, 2024, the court directed Harman to file a concise statement of errors complained of on appeal within twenty (20) days.² On September 6, 2024, Harman

²The order entered on August 27, 2024 only addressed three of Harman's cases because those are the only cases where the court had received a copy of a notice of appeal.

filed a notice of appeal in the remaining eleven cases. On or about September 13, 2024,³

Harman filed his concise statement in which he asserted the following two issues:

1. Whether the trial court abused its discretion and/or committed an error of law in treating Appellant's Motion to Reinstate Right to Direct Appellate Review *Nunc Pro Tunc* as a Post Conviction Relief Act (PCRA) petition and in dismissing said Motion as untimely.
2. Whether the trial court abused its discretion and/or committed an error of law by dismissing Appellant's Motion to Reinstate Right to Direct Appellate Review *Nunc Pro Tunc* without a hearing on the merits.

DISCUSSION

Initially, the court notes that it appears that most of Harman's appeals were not timely filed. The court issued its order dismissing Harman's petition on July 24, 2024. Harman had thirty (30) days within which to file his notices of appeal. 42 Pa. C.S.A. §5571(b). The thirtieth day was Friday, August 23, 2024. Harman filed his appeals in 1079-2001, 1160-2001, and 1478-2001 on August 22, 2024; therefore, those appeals are timely. The notices of appeal in the remaining cases were not filed until September 6, 2024.

Harman filed an *in forma pauperis* (IFP) petition on August 21, 2024. In that petition, Harman explained that he had funds available to file a few appeal notices but insufficient funds to pay for all fourteen appeals. Harman filed three appeals on August 22, 2024. The court granted his IFP petition on August 29, 2024. The remaining notices of appeal were filed on September 6, 2024. The court does not know why Harman did not submit all of his notices of appeal with his IFP petition. Had he done so, the notices could have been considered filed as of August 21, 2024. The notice would have only been considered filed after that date if the court

³The concise statement in 1079-2001, 1160-2001 and 1079-2001 was filed on September 13, 2024. The order directing a concise statement in the remaining case was filed on September 9, 2024 and the concise statements in response thereto were filed on September 26, 2024. The same two issues are asserted in each concise

had denied his IFP petition and Harman was required to pay the filing fees to perfect his appeal.

The time limits for filing an appeal are jurisdictional, and this court lacks the authority to extend the 30-day period for filing a notice of appeal. *See* Pa. R.A.P. 105(b); *Commonwealth v. Smith*, 501 A.2d 273, 275 (Pa. Super. 1985) (“A court may not enlarge the time for filing a notice of appeal as a matter of grace or indulgence.”); *State Farm Mut. Auto. Ins. Co. v. Schultz*, 421 A.2d 1224, 1225 (Pa. Super. 1980) (neither the lower court nor the Superior Court may enlarge the time for filing the notice of appeal). Since the notices of appeal in eleven cases were not timely filed, the Superior Court could quash them.

Harman first asserts that the court abused its discretion and/or committed an error of law in treating Appellant’s Motion to Reinstate Right to Direct Appellate Review Nunc Pro Tunc as a Post Conviction Relief Act (PCRA) petition and in dismissing said Motion as untimely. This issue is frivolous.

The court was required to treat Appellant’s Motion as a PCRA petition. A PCRA petition is “the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis.” 42 Pa. C.S.A. §9542. Regardless of how the filing is titled, if it seeks relief that is cognizable under the PCRA, the court must treat it as a PCRA petition. *Commonwealth v. Powell*, 290 A.3d 751, 758 (Pa. Super. 2023). Specifically, with respect to the reinstatement of appeal rights, the Pennsylvania Supreme Court settled this issue decades ago in its decision in *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999). In *Lantzy*, the trial court denied the petitioner’s request to reinstate his appeal rights through a PCRA petition. The petitioner appealed. The Superior Court held that the reinstatement of appeal rights was not

cognizable under the PCRA where the petitioner did not assert his innocence; however, the Superior Court found that relief was available outside of the PCRA through a separate petition to reinstate appeal rights nunc pro tunc. The Pennsylvania Supreme Court reversed. The Court held that the relief requested was cognizable under the PCRA and explained that permitting bifurcated litigation would collide with the legislative directive that the PCRA provide the sole means for obtaining collateral relief. *Id.* at 569-570. The Court then expressly stated: “This reasoning compels the conclusion that *the PCRA provides the exclusive remedy for post-conviction claims seeking restoration of appellate rights due to counsel's failure to perfect a direct appeal*, since such claims also were cognizable on traditional habeas corpus review.” *Id.* at 570 (emphasis added). *Lantzy* has been repeatedly cited for this proposition over the last 25 years. Where there is an unjustified failure to file an appeal, prejudice is presumed. *Id.* at 572. What this means is that “*where the remaining requirements of the PCRA are satisfied*, the petitioner is not required to establish his innocence or demonstrate the merits of the issue or issues which would have been raised on appeal.” *Id.* In light of *Lantzy* and its progeny, the court did not err in treating Harman’s petition as a PCRA petition.

The court also did not err in dismissing it as untimely. The PCRA provides that any petition must be filed within one year of the date the judgment becomes final or the petitioner must plead and prove one of the three statutory exceptions. 42 Pa. C.S. §9545(b). The one-year period commences upon the expiration of the time period for seeking direct review. *Commonwealth v. Brown*, 943 A.2d 264, 268 (Pa. 2008). There are no equitable exceptions to the PCRA’s timeliness requirements. *Id.* at 267; *see also Commonwealth v. Taylor*, 283 A.3d 178, 184-85 (Pa. 2022) (PCRA’s time limits are jurisdictional in nature and not subject to

equitable principles such as tolling except as provided by statute). Furthermore, the nature of the constitutional violation alleged has no effect on the PCRA time bar. *Brown*, 943 A.2d at 267.

The PCRA states:

(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)(1). A judgment becomes final at the conclusion of direct review or at the expiration of time for seeking the review. 42 Pa. C.S.A. §9545(b)(3). Harman pleaded guilty to numerous counts of burglary on November 15, 2001, and, on February 5, 2002, the court imposed an aggregate sentence of 28 -54 years' incarceration in a state correctional institution. Harman, through his public defender, filed a timely motion to reconsider sentence, which the court denied on or about February 22, 2002. Harman had thirty (30) days within which to file a direct appeal, but a notice of appeal was not filed. Therefore, Harman's judgment of sentence became final on or about March 25, 2002.⁴

To file a facially timely PCRA petition, Harman's Motion needed to be filed on or before March 25, 2003. Harman's Motion was not filed until May 22, 2024. Therefore, it was patently

⁴The thirtieth day was Sunday, March 24, 2002. Therefore, the appeal deadline would have extended to Monday, March 25, 2002. See 1 Pa. C.S. §1908 (regarding omitting Saturdays, Sundays, and legal holidays

untimely.

Harman initially did not assert any of the statutory exceptions. After receiving the court's notice of intent to dismiss his petition, Harman attempted to assert the first statutory exception, "governmental interference" in his response. Harman first asserted that his plea counsel, who was an assistant public defender, was acting as a government official and by failing to timely file a direct appeal, his plea counsel interfered with Defendant's right to direct appellate review under both the Constitution and laws of the United States and the Constitution and laws of the Commonwealth of Pennsylvania. Harman relied on the Public Defender Act, 16 Pa. C.S. §9960, for his argument that assistant public defenders are government officials. The court did not agree, as the PCRA expressly states that the term "government official" does not include defense counsel, whether appointed or retained. 42 Pa. C.S. §9545(b)(4). Therefore, Harman's reliance on the Public Defender Act is misplaced, and Attorney Cleland cannot be considered a government official as a matter of law.

Harman also asserted that he is entitled to relief because when he filed his first pro se petition on April 20, 2012, the court failed to appoint counsel to represent him to include averments concerning timeliness and/or §9545(b)(1) time bar exceptions. He also relied on *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 699 (Pa. 1999) for the proposition that the denial of PCRA relief cannot stand unless the petitioner was afforded the assistance of counsel and Rule 904(C) of the Pennsylvania Rules of Criminal Procedure that indigent defendants are entitled to appointment of legal counsel to represent them on their first PCRA petitions. The court also rejected these assertions for several reasons.

First, the court found that *Albrecht* was distinguishable in that it involved the appeal of a *timely* PCRA petition. *Albrecht* does not stand for the proposition that a defendant can wait decades to assert that counsel was ineffective for failing to file a direct appeal or to assert that he was not appointed counsel for his “first” PCRA petition. Additionally, in at least one of Harman’s cases, his first PCRA petition was filed in November of 2003 and counsel was appointed to represent him. *See* CP-41-CR-0000863-2001. Furthermore, even that petition was not filed timely, as it was required to be filed on or before March 24, 2003 but was not filed until November 24, 2003. Therefore, even his first PCRA petition was untimely.

Second, the exception contained in Section 9545(b)(1)(i) states:

(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;

The court’s alleged failure to appoint counsel to represent Harman on his PCRA petition filed on April 20, 2012, regardless of whether it was his first, second or subsequent PCRA petition, did not prohibit him from filing a timely PCRA petition on or before March 24, 2003. Something that occurred in 2012, more than nine years after the one-year filing period expired, could not possibly have interfered with Harman’s presentation of his claims in a timely manner, i.e., between March 24, 2002 and March 24, 2003.

Third, where, as here, the claim giving rise to the exception arose prior to December

24, 2017, the claim needed to be filed within 60 days that it could have been presented. *See* 42 Pa. C.S.A. §9545(b)(2)(former). Although the current statute states that the claim must be filed within one year that it could have been presented, that amendment did not occur until Act 146 of 2018 was passed on October 24, 2018 and became effective on December 24, 2018. Since the alleged denial of counsel occurred in 2012, Harman would be subject to the 60-day time limit of former subparagraph (b)(2). Harman would have been aware that he was without counsel at the time he was litigating his PCRA petition in 2012. He was also aware at that time that counsel failed to file a direct appeal on his behalf at least by April of 2012, because he mentions it in paragraph 12 of his PCRA petition filed on or about April 27, 2012. Yet he never asserted a claim that counsel was ineffective for failing to file a direct appeal until he filed his nunc pro tunc motion in 2024. The court dismissed the 2012 petition on December 3, 2012. Harman could have appealed that decision and asserted in his appeal that the court erred in failing to appoint counsel to represent him, but he did not do so. He did not appeal at all. A petitioner cannot prevail on a PCRA if his claim is previously litigated or waived. 42 Pa. C.S. §9543(a)(3). A claim is waived if it could have been asserted on appeal or in a prior PCRA proceeding. His claim that the court erred in failing to appoint counsel for his 2012 PCRA petition is waived. His claim that counsel was ineffective for failing to file a direct appeal was also waived, because he could have asserted it in the his prior PCRA petitions.

Fourth, Harman did not allege any facts and did not attached any affidavits or witness certifications to show when he discovered that Attorney Cleland failed to file a direct appeal or what efforts Harman took to determine the status of any appeal after Attorney Cleland's

letter in June of 2002. The Rules of Criminal Procedure require that a PCRA petition contain the facts supporting each ground for the relief requested and either a citation to where the facts appear in the record or the identification of affidavits, documents and other evidence showing such facts. Pa. R. Crim. P. 902(A)(12). Additionally, if a petitioner is seeking an evidentiary hearing, he must include a signed witness certification as to each intended witness and include any documents material to the witness's testimony. Pa. R. Crim. P. 902(A)(15); 42 Pa. C.S. §9545(d)(1).

Appellate case law requires a petitioner to set forth factual allegations regarding how and when he discovered the evidence or information that forms the basis of his statutory exception and his claim. For example, in *Commonwealth v. Breakiron*, 781 A.2d 94 (Pa. 2001), the appellant asserted that he was entitled to invoke the first statutory exception regarding governmental interference because the Commonwealth withheld *Brady* material. Although the Pennsylvania Supreme Court indicated that a *Brady* claim could potentially present a claim of interference by government officials, it nonetheless upheld the dismissal of the appellant's PCRA petition because the appellant failed to set forth any facts as to how and when he discovered the *Brady* material that the Commonwealth allegedly withheld from him and he failed to offer a reasonable explanation as to why the information, with the exercise of due diligence, could not have been discovered earlier. *Id.* at 98; *see also Commonwealth v. Yarris*, 731 A.2d 581, 590 (Pa. 1999)(the appellant did not explain when or how he obtained the witness statements and he offered no explanation why the statements could not, with the exercise of due diligence, have been obtained much earlier); *Commonwealth v. Vega*, 754 A.3d 714, 718 (Pa. Super. 2000)(the defendant failed to provide

the date on which he learned of evidence giving rise to his newly discovered fact claim).

The case which appears to be directly on point with respect to the timeliness issue, however, is *Commonwealth v. Carr*, 768 A.2d 1164 (Pa. Super. 2000). In *Carr*, as here, trial counsel failed to file a direct appeal. Carr was sentenced on September 25, 1995. He filed a motion to reconsider sentence, which the court denied on January 10, 1996. No direct appeal was filed. Therefore, Carr's judgment of sentence became final on or about February 9, 1996. On April 27, 1999, Carr filed a PCRA petition. Carr claimed that he did not learn of counsel's failure to file an appeal until approximately March 25, 1999. In affirming the trial court's dismissal of the PCRA petition as untimely without holding an evidentiary hearing, the Pennsylvania Superior Court stated

Trial counsel's failure to file a direct appeal was discoverable during Appellant's one-year window to file a timely PCRA petition. In fact, the expiration of Appellant's time to file a direct appeal initiated the PCRA's one-year clock. Thus, Appellant had a full year to learn if a direct appeal had been filed on his behalf. A phone call to his attorney or the clerk of courts would have readily revealed that no appeal had been filed. Due diligence requires that Appellant take such steps to protect his own interests. The mere fact that Appellant alleges his trial counsel was ineffective for not filing his appeal does not save his petition from the PCRA's timeliness requirements. Accordingly, the PCRA court lacked jurisdiction to entertain Appellant's petition for relief.

768 A.2d at 1168 (citations omitted). Since the Superior Court affirmed the dismissal of Carr's PCRA petition that was filed two years beyond the one-year filing deadline despite an allegation that Carr did not discover counsel's failure until March 25, 1999, this court's dismissal of Harman's PCRA petition filed approximately 20 years beyond the one-year filing deadline is appropriate, especially when Harman has not made any factual allegations regarding when and how he discovered that Attorney Cleland failed to file a direct appeal as

requested or any explanation why he could not have discovered such information, with the exercise of due diligence, much earlier.

Harman also asserts that the trial court abused its discretion and/or committed an error of law by dismissing Appellant's Motion to Reinstate Right to Direct Appellate Review *Nunc Pro Tunc* without a hearing on the merits. Again, the court cannot agree.

As previously discussed, the court was required to treat Harman's motion as a PCRA petition. The time limits of the PCRA are jurisdictional. "As such, when 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*, 753 A.2d 780, 783 (Pa. 2000)(emphasis added). The court lacked jurisdiction to hold an evidentiary hearing on the merits of Harman's claims because he failed to sufficiently plead that his petition was timely. Harman did not plead any facts to show that his petition was timely. He made legal arguments, which the court rejected based on appellate case law that the court was bound to follow.

Conclusion

In accordance with binding appellate case law, the court properly treated Harman's motion as a PCRA petition and dismissed it as untimely without holding an evidentiary hearing on the merits of his claims. The time limits of the PCRA are jurisdictional. The court lacked jurisdiction to hold an evidentiary hearing or grant any relief on Harman's untimely petition.

DATE: 10/14/24

By the Court,

Nancy L. Butts, President Judge

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Superior Court (original & 1)
01-10,055; 01-10,284; 01-10,285;
01-10,286; 01-10,586; 01-10,681;
01-10,825; 01-10,828;
01-10,862; 01-10,863; 01-11,017;
01-11,079;01-11,160;