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Commonwealth v. Carbaugh

COMMONWEALTH OF PENNSYLVANIA v. CURTIS CARBAUGH, Defendant/Appellant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch

Criminal Action No. 275 of 1992

Post Conviction Relief Act - 42 Pa. C.S.A. § 9541, et seq., § 9543, § 9545 and § 9760; Rule 907(1) of the Pennsylvania Rules of Criminal Procedure - Notice requirement - Dismissal without a hearing

1. 42 Pa. C.S.A. § 9541, et seq., is the only vehicle for addressing the legality of a sentence beyond the ten (10) days to file a motion to modify the sentence and the thirty (30) days to file a direct appeal to the Superior Court.
2. 42 Pa. C.S.A. § 9541, et seq., becomes applicable when the petitioner has been convicted of a crime under the laws of the Commonwealth and is currently serving out his sentence, awaiting execution of a sentence of death, or serving a sentence which must expire before the petitioner may commence serving the disputed sentence.
3. Where the petitioner fails to state a claim under 42 Pa. C.S.A. § 9541, et seq., the court's appropriate action would be to dismiss the defendant's petition.
4. Where the record indicates that appointed counsel received numerous letters from the defendant, reviewed these letters and the defendant's complaints, reviewed the record and the applicable law and came to the conclusion that the defendant's petition had no merit, this satisfied the notice requirement under Commonwealth v. Bond.
5. The petitioner is required to file his post-conviction relief petition within one year of the date that the judgment becomes final.
6. The petitioner may file his petition after that period only if the petitioner alleges and proves that 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.
7. The Court does not have the authority to provide credit for time served on prior unrelated charges. *Doxsey v. Commonwealth*, 674 A.2d 1173 (Pa. Commw. Ct. 1996).

Appearances:

John F. Nelson, Esq., *District Attorney*

Curtis L. Carbaugh, *Defendant/Appellant*

OPINION

Walker, P.J., October 25, 2002

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Factual Summary and Procedural History

Defendant/Petitioner Curtis Carbaugh was convicted on one count of robbery and sentenced by this court on December 18, 1992. The defendant was ordered to serve ten (10) to twenty (20) years with

a commencement date of December 18, 1992. At this time, the defendant neither filed a motion to correct the sentence nor an appeal of the sentence to the Superior Court within the allotted time.

The defendant pled *nolo contendere* to one count of robbery on July 30, 1992. Under the plea agreement, this court made two promises to the defendant. First, the court promised that the sentence imposed would run concurrent with the sentence imposed in Huntington County. If the court did not impose a concurrent sentence, it would allow the defendant to withdraw his plea. Second, this court promised that it would give the defendant credit for time served if the court had the authority. This court does not have the authority to give credit for time served when the defendant is serving time on an unrelated charge.

Previous to this conviction in Franklin County, the defendant was charged and convicted of robbery in Huntingdon County, Mifflin County and Adams County. Pursuant to a plea agreement between the defendant and the Huntingdon County District Attorney's office, the defendant was sentenced to ten (10) to twenty (20) years with a commencement date of January 25, 2002.

On March 5, 1992, the defendant was sentenced in Mifflin County to serve a term of ten (10) to twenty (20) years in a state correctional institution. The sentence was ordered to be computed from January 25, 1992, and to run concurrent with the sentence imposed by Huntington County.

On September 29, 1992, the defendant was sentenced in Adams County to serve a term of ten (10) to twenty (20) years in a state correctional institution. The sentence was ordered to be computed from January 25, 1992, and to run concurrent with the sentence imposed by Huntington County.

Sometime in December of 2000, the defendant began to investigate about the date of his eligibility of parole. At this point is when the defendant alleges that he first found out about the commencement date of his Franklin County sentence. In January of 2001, the defendant filed a motion to correct an error in sentencing. This court denied the petition and the defendant appealed this decision to the Superior Court.

After again reviewing the record and the applicable law, this court realized that the defendant's petition was a petition for post conviction relief. In its Pa. R.A.P. 1925(a) opinion, this court asked the Superior Court to remand the case back to the trial court for the appointment of counsel. The Superior Court, without addressing the merits of the defendant's claims, remanded the case back to the trial court for the appointment of counsel. The Superior Court directed the appointed counsel to either file an amended PCRA or a no-merit letter in accordance with Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988).

On October 4, 2001, this court appointed counsel for the defendant. Counsel for the defendant, after receiving numerous letters from the defendant and after reviewing the record, filed a no-merit letter in June of 2002.

On July 17, 2002, after reviewing the record, the Superior Court memorandum dated September 17, 2001, the appointed counsel's no-merit letter, the defendant's arguments and the applicable law, this court dismissed the defendant's post conviction relief action.

On July 31, 2002, the defendant filed a motion for reconsideration within twenty (20) days as required in Rule 907 of the Pennsylvania Rules of Criminal Procedure. On August 5, this court denied the defendant's motion for reconsideration. The defendant appealed the denial of his post conviction relief to the Superior Court.

The defendant argues that the court erred when it failed to give the defendant notice of the intention to dismiss the petition without a hearing. The defendant also argues that the court erred when it failed to follow the plea agreement from Huntington County. Finally, the defendant argues that his post conviction relief should be granted because appointed counsel was ineffective.

This opinion results from that appeal.

Discussion

The Post Conviction Relief Act, 42 Pa. C.S.A. § 9541, *et seq.*, is the only vehicle for addressing the legality of a sentence beyond the ten (10) days to file a motion to modify the sentence and the thirty (30) days to file a direct appeal of the sentence to the Superior Court. Commonwealth v. Hockenberry, 689 A.2d 283 (Pa. Super. Ct. 1997). The Post Conviction Relief Act is the sole means by which a defendant/petitioner may obtain collateral relief. Commonwealth v. Guthrie, 749 A.2d 502 (Pa. Super. Ct. 2000). Under the Post Conviction Relief Act, a defendant/petitioner may seek the court to review the circumstances of the defendant's conviction of a crime.

The Post Conviction Relief Act becomes applicable when the petitioner has been convicted of a crime under the laws of the Commonwealth and is currently serving out his sentence, awaiting execution of a sentence of death, or serving a sentence which must expire before the petitioner may commence serving the disputed sentence. 42 Pa. C.S.A. § 9543 (1998); see also Commonwealth v. Appel, 689 A.2d 171 (Pa. 1997). The conviction or sentence must also result from one or more of the following:

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (vi) The unavailability at the time of the trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

42 Pa. C.S.A. § 9543 (1998).

The defendant, here, has been convicted of a crime under the laws of the Commonwealth and is currently serving out his sentence. The defendant also alleges that the conviction has resulted in the following:

Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place; and

That the allegation of error had not been previously litigated or waived; and

That the failure to litigate the issue prior to or during the trial or on direct appeal could have been the result of any rational, strategic, or tactical decision by counsel.

Consequently, this court reviewed the defendant's petition under the Post Conviction Relief Act.

The purpose of the Post Conviction Relief Act is to prevent a fundamentally unfair conviction and to provide an action where individuals who have been serving illegal sentences may obtain collateral relief. Commonwealth v. Carbone, 707 A.2d 1145 (Pa. Super. Ct. 1998). In his petition, the defendant must prove his assertions by a preponderance of the evidence. The petitioner is obligated to state his issues and to demonstrate in his pleadings and briefs how the issues will be proved. Commonwealth v. Rivers, 786 A.2d 923 (Pa. 2001). If the petitioner fails to state a claim, the court's appropriate action would be to dismiss the defendant's petition.

The petitioner has failed to demonstrate how he will prove ineffective assistance of counsel. The defendant makes a broad allegation in his amended petition that his ground for relief is ineffective assistance of counsel. The defendant had the option of using the standard pro se Post Conviction Relief Act form to aid in his petition. It is important to note that the defendant is not required to use this form, although petitioners should take advantage of using the form to assist them in filing their petitions. See Commonwealth v. Yarris, 731 A.2d 581; see also Commonwealth v. Jerman, 762 A.2d 366. The defendant, in his own form, has failed to assert how trial counsel was ineffective. Consequently, the appropriate action would be to dismiss the appeal.

The defendant, however, in his concise statement of matters complained of on appeal presents two more assertions that this court believes should be addressed and further analysis of the defendant's petition under the Post Conviction Relief Act is warranted.

Under 42 Pa. C.S.A. § 9545, the petitioner is required to file his post conviction relief petition within one year of the date that the judgment becomes final. 42 Pa. C.S.A. § 9545 (1995). In the instant case, the judgment became final thirty (30) days after the imposition of the sentence, which was January 17, 1993. As such, the defendant's petition should have been filed before January 17, 1994. Under 9545 (b) (1), a petitioner may file his petition after that period only if the petitioner alleges and proves that 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. 42 Pa. C.S.A. § 9545(b)(1)(ii).

The petitioner asserts that he was unaware that the sentencing court gave him a sentence with a commencement date of December 18, 1992. He claims that only when he investigated his eligibility for parole did he discover that his sentence started on December 18, 1992. He presents no evidence to prove this claim. He only makes broad allegations. The record establishes that the sentence was imposed on December 18, 1992. There is nothing in the December 18, 1992, order indicating that the sentence would start on January 25, 1992. The defendant's petition fails to prove that the facts were unknown to the petitioner and could not have been ascertained by the exercise of due diligence. This court cannot direct that a sentence commence on a date prior to sentencing when the defendant is serving time on unrelated charges. Doxsey v. Commonwealth, 674 A.2d 1173 (Pa. Commw. Ct. 1996). As a result, the petitioner's post conviction relief petition should be dismissed because it is untimely.

The timeliness requirements under the Post Conviction Relief Act are mandatory. This court may not properly disregard or alter them in order to reach the merits of the claims raised in the Post Conviction Relief Act petition. Commonwealth v. Hanyon, 772 A.2d 1033 (Pa. Super. Ct. 2001). It is important to note that mere delay in filing may not be sufficient reason to summarily reject a petition for post conviction relief. Commonwealth v. Johnson, 532 A.2d 796 (Pa. 1987).

For this reason, the court will address the petitioner's two claims from his concise statement of matters complained of on appeal. First, the defendant claims that the trial court erred when it failed to comply with Rule 907 (formerly 1507) of the Pennsylvania Rules of Criminal Procedure. In support of his contentions, the defendant cites Rule 907 of the Pennsylvania Rules of Criminal Procedure, Commonwealth v. Guthrie, 749 A.2d 502 (Pa. Super. Ct. 2000), and Commonwealth v. Feighery, 661 A.2d 437 (Pa. Super. Ct. 1995).

Rule 907 provides:

the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claims. If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state the reasons for the dismissal. The defendant may respond to the proposed dismissal within twenty (20) days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

Pa. R. Crim. P. 907(1).

In Guthrie, the Superior Court stated that the twenty (20) day notice of intention to dismiss requirement is mandatory. Guthrie, 749 A.2d at 503, *citing* Commonwealth v. Feighery, 661 A.2d 437 (Pa. Super. Ct. 1995). The trial court dismissed the petitioner's claims because of untimely filing. The Superior Court held that the petitioner's motion to correct an illegal sentence was untimely filed. Nevertheless, the Superior Court remanded the case back to the trial court because an indigent petitioner is entitled to assistance of counsel in determining whether his petition was untimely filed.

In Feighery, the Superior Court reversed the trial court when it held that the defendant failed to receive the mandatory notice of intention to dismiss a post conviction relief petition without a hearing. Feighery, 661 A.2d at 438. The court reasoned that the language "shall" of 1507(a) (new Rule 907(1)) clearly indicates that the rule is mandatory. The court also rebuked the Commonwealth's contention that the no-merit letter satisfied the notice requirement under Commonwealth v. Bond, 630 A.2d 1281 (Pa. Super. Ct. 1993). It reasoned that there was no evidence of correspondence between appointed counsel and the defendant and that the letter made no mention of the potential for dismissal without a hearing.

This court believes that Commonwealth v. Bond does apply in the instant case. The record indicates that the appointed counsel received numerous letters from the defendant, reviewed these letters and the defendant's complaints, reviewed the record and the applicable law. At this point, counsel came to the conclusion that the defendant's petition had no merit. As such, this court was not required to notify the petitioner of the intention to dismiss his petition under Commonwealth v. Bond. It is also important to note

that the defendant filed his motion for reconsideration within twenty days, as prescribed under Rule 907(1).

The defendant/petitioner next argues that the court erred when it failed to enforce the plea agreement of ten (10) to twenty (20) years with a commencement date of January 25, 1992. The defendant asserts that the sentencing court failed to keep its promise. He alleges that the sentencing court promised to compute his sentence from January 25, 1992. The petitioner cites the transcript of the plea colloquy to support his contention.

This court held and still believes that it did follow the plea agreement. According to the transcripts of the plea colloquy, the court promised the defendant two things. First, this court promised that the sentence imposed would run concurrent to the sentence imposed in Huntingdon County. If the court did not run the sentence concurrent, the court would allow the defendant to withdraw his plea of nolo contendere. The court fulfilled this promise by ordering that the sentence imposed on December 18, 1992, run concurrent to the sentence imposed in Huntingdon County.

Second, this court promised the defendant that if **it is legal** (emphasis added), it would commence the starting date as of January 25, 1992. Under § 9760, this court does not have the authority to provide credit of time served on prior unrelated charges. See 42 Pa. C.S.A. § 9760 (1980); see also Wassell v. Commonwealth, 658 A.2d 466, 469 (Pa. Commw. Ct. 1995). It cannot direct that a sentence commence on a date prior to imposition of sentence when a defendant is serving time on an unrelated charge. Doxsey v. Commonwealth, 674 A.2d 1173 (Pa. Commw. Ct. 1996).

Accordingly, the petitioner's contentions are without merit and should be denied on appeal.

Conclusion

For the reasons stated above, defendant/petitioner Curtis Carbaugh's petition for post conviction collateral relief is denied and the appeal should be dismissed.

This court stands by its July 17, 2002, order denying the defendant's petition for post conviction relief under the Post Conviction Relief Act and by its August 5, 2002, order denying the defendant's motion for reconsideration.