**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

| | |
|---|---|
| JOHN H. COHEN<br><br>Appellant<br><br>v.<br><br>MARK V. CAPOZZA<br><br>Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 1803 WDA 2015 |

Appeal from the Order October 27, 2015
In the Court of Common Pleas of Mercer County
Criminal Division at No(s): 32 CR 1987

BEFORE: GANTMAN, P.J., OLSON, J., and FITZGERALD, J.*

JUDGMENT ORDER BY GANTMAN, P.J.: **FILED APRIL 26, 2016**

Appellant, John H. Cohen, appeals *pro se* from the order entered in the Mercer County Court of Common Pleas, which denied his *pro se* serial petition for collateral relief (labeled a petition for writ of *habeas corpus ad subjiciendum*), per the Post Conviction Relief Act ("PCRA"), at 42 Pa.C.S.A. §§ 9541-9546. On May 18, 1987, a jury convicted Appellant of first-degree murder and attempted murder. The court sentenced Appellant on June 3, 1988, to life imprisonment for the murder conviction and a consecutive 3½-7 years' imprisonment for the attempted murder conviction. This Court affirmed the judgment of sentence on May 24, 1989, and our Supreme Court denied allowance of appeal on May 25, 1990. ***See Commonwealth v. Cohen***, 563 A.2d 188 (Pa.Super. 1989), *appeal denied*, 525 Pa. 610, 577

---

*Former Justice specially assigned to the Superior Court.

A.2d 542 (1990). On September 30, 2015, Appellant filed the current petition for writ of *habeas corpus ad subjiciendum* in the civil division, challenging his criminal conviction and sentence.[1] The court treated Appellant's filing as a serial PCRA petition and issued appropriate notice per Pa.R.Crim.P. 907 on October 6, 2015. Appellant filed a *pro se* response on October 21, 2015. On October 27, 2015, the court denied the PCRA petition as untimely. Appellant timely filed a notice of appeal on November 9, 2015. The next day, the court ordered Appellant to file a concise statement per Pa.R.A.P. 1925(b); Appellant timely complied on November 30, 2015.

Preliminarily, any petition for post-conviction collateral relief will generally be considered a PCRA petition, even if captioned as a request for *habeas corpus* relief, if the petition raises issues for which the relief sought is available under the PCRA. ***See Commonwealth v. Peterkin***, 554 Pa. 547, 722 A.2d 638 (1998); 42 Pa.C.S.A. § 9542 (stating PCRA shall be sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for same purpose). The writ of *habeas corpus* continues to exist as a separate remedy only if the claim raised is not cognizable under the PCRA. ***Peterkin, supra*** at 552, 722 A.2d at 640. As well, the timeliness of a PCRA petition is a jurisdictional requisite. ***Commonwealth v. Turner***, 73 A.3d 1283 (Pa.Super. 2013), *appeal denied*,

---

[1] The filing was subsequently transferred to the criminal division.

625 Pa. 649, 91 A.3d 162 (2014). A PCRA petition must be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment is deemed final at the conclusion of direct review or at the expiration of time for seeking review. 42 Pa.C.S.A. § 9545(b)(3). The exceptions to the PCRA time-bar allow for very limited circumstances under which the late filing of a petition will be excused; a petitioner asserting an exception must file a petition within 60 days of the date the claim could have been presented. ***See*** 42 Pa.C.S.A. § 9545(b)(1-2).

Instantly, Appellant attacks his first-degree murder conviction and life sentence, claiming the Commonwealth did not specifically charge him with first-degree murder,[2] the court lacked statutory authority to impose a life sentence, and the court lacked authority to instruct the jury on first-degree murder where Appellant's case was not a capital case. Despite his effort to distance his current petition from the PCRA, Appellant's challenges to the legality of his conviction and sentence are cognizable under the PCRA. ***See Commonwealth v. Fowler***, 930 A.2d 586 (Pa.Super. 2007), *appeal denied*, 596 Pa. 715, 944 A.2d 756 (2008) (holding any collateral attack on legality of sentence must be raised in PCRA petition); ***Guarrasi v. Scott***, 25 A.3d 394 (Pa.Cmwlth. 2011) (stating plaintiff cannot use civil action to wage collateral attack on his criminal proceedings). Thus, the court properly

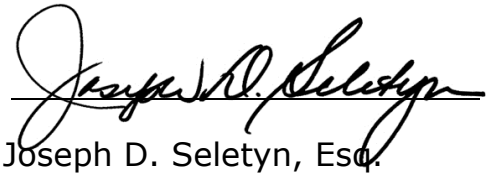
---

[2] The record makes clear the Commonwealth charged Appellant with first and third degree murder along with other offenses.

treated Appellant's most recent prayer for collateral relief as a PCRA petition. ***See Peterkin, supra***. Further, Appellant's judgment of sentence became final on August 23, 1990, upon expiration of the time to file a petition for writ of *certiorari* with the United States Supreme Court. ***See*** U.S.Sup.Ct.R. 13. Appellant filed the current, *pro se* serial petition for collateral relief on September 30, 2015, which is patently untimely.[3] ***See*** 42 Pa.C.S.A. § 9545(b)(1). In his effort to keep his petition outside the PCRA, Appellant did not plead or prove any of the statutory exceptions required to revive an otherwise untimely PCRA petition. ***See*** 42 Pa.C.S.A. § 9545(b)(1). Thus, Appellant's petition remains an untimely PCRA petition, and the court properly denied relief. Accordingly, we affirm.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/26/2016

[3] The docket entries in Appellant's criminal case indicate the present petition is at least his second petition for collateral relief.