

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MARK ETHAN MCFALL,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1968 EDA 2015

Appeal from the PCRA Order May 27, 2015
In the Court of Common Pleas of Chester County
Criminal Division at No(s):
CP-15-CR-0001530-2006
CP-15-CR-0005731-2005

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and PLATT, J.*

MEMORANDUM BY BENDER, P.J.E.:

FILED FEBRUARY 01, 2016

Appellant, Mark Ethan McFall, appeals *pro se* from the post-conviction court's May 27, 2015 order dismissing, as untimely, his second petition for relief filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

In August of 2007, a jury convicted Appellant of various sexual offenses based on evidence that he drugged and sexually assaulted four male victims, all of whom worked for Appellant's towing company. Appellant received an aggregate term of 12 to 27 years' incarceration on February 6, 2008. He timely appealed to this Court, and after we affirmed his judgment

* Retired Senior Judge assigned to the Superior Court.

of sentence, our Supreme Court denied his petition for allowance of appeal on April 27, 2010. ***Commonwealth v. McFall***, 988 A.2d 724 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 993 A.2d 900 (Pa. 2010).

On August 31, 2010, Appellant filed a timely PCRA petition and counsel was appointed. On October 1, 2013, the PCRA court issued an order denying Appellant's petition. This Court affirmed that order on appeal, and our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. McFall***, 104 A.3d 60 (Pa. Super. 2014), *appeal denied*, 108 A.3d 34 (Pa. 2015).

On March 27, 2015, Appellant filed the *pro se* PCRA petition underlying the present appeal. After conducting an evidentiary hearing, the PCRA court issued an order on May 27, 2015, dismissing Appellant's petition, reasoning that it was untimely filed. Appellant filed a timely, *pro se* notice of appeal, as well as a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal, although he was not ordered to do so by the PCRA court. On July 14, 2015, the court issued a statement, in lieu of a Rule 1925(a) opinion, indicating that it was relying on the reasons expressed in its May 27, 2015 order dismissing Appellant's petition.

In this appeal, Appellant presents three issues for our review:

1.) First PCRA counsel ... [was] ineffective for not raising trial counsel's ineffectiveness, in addition to other issues, in the first PCRA petition. This constitutes [a] constitutional violation as [Appellant] has the right to effective assistance of counsel and a right to be heard in court.

2.) [Appellant] contends that the [PCRA] [c]ourt ... erred in dismissing his second PCRA petition as untimely. The second PCRA petition [was] filed in a timely manner because it was filed in less than fifteen[](15) days after [Appellant] was notified by his counsel of the completion of [the] first PCRA review by [the Pennsylvania] Supreme Court.

3.) [Appellant] also contends that the [PCRA] court erred in dismissing his “[n]ew [e]vidence” [claim] as untimely.

Appellant’s Brief at 4.

This Court’s standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 2007). We must begin by addressing the timeliness of Appellant’s petition, because the PCRA time limitations implicate our jurisdiction and may not be altered or disregarded in order to address the merits of a petition. ***Commonwealth v. Bennett***, 930 A.2d 1264, 1267 (Pa. 2007) (stating PCRA time limitations implicate our jurisdiction and may not be altered or disregarded to address the merits of the petition). Under the PCRA, any petition for post-conviction relief, including a second or subsequent one, must be filed within one year of the date the judgment of sentence becomes final, unless one of the following exceptions set forth in 42 Pa.C.S. § 9545(b)(1)(i)-(iii) applies:

(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. § 9545(b)(1)(i)-(iii). Any petition attempting to invoke one of these exceptions “shall be filed within 60 days of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2).

Here, Appellant’s judgment of sentence became final on July 26, 2010, ninety days after our Supreme Court denied his petition for allowance of appeal. **See** 42 Pa.C.S. § 9545(b)(3) (stating that a judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review); **Commonwealth v. Owens**, 718 A.2d 330, 331 (Pa. Super. 1998) (directing that under the PCRA, petitioner’s judgment of sentence becomes final ninety days after our Supreme Court rejects his or her petition for allowance of appeal since petitioner had ninety additional days to seek review with the United States Supreme Court). Consequently, Appellant had until July 26, 2011 to file a timely petition, making his present petition, filed on March 27, 2015, patently untimely. For this Court to have jurisdiction to review the merits of Appellant’s claims, he must prove the

applicability of one of the above-stated exceptions to the PCRA's one-year time-bar.

Appellant argues that he meets the exception of section 9545(b)(1)(ii) based on the fact that after trial, a "plaster cast penis" was discovered inside Appellant's apartment.¹ Appellant's Brief at 10. Appellant claims that he and one of the victims made this plaster cast using the victim's body, which proves they "had a mutually consensual relationship...." ***Id.*** He further asserts that this "new evidence came to light" in March of 2012, during the pendency of his first, counseled PCRA petition. ***Id.*** at 9. Appellant states that he informed his PCRA counsel about this 'new evidence,' yet that attorney failed to present a newly-discovered-evidence claim in an amended petition. ***Id.*** at 9. Appellant devotes a large portion of his appellate brief to arguing that his initial PCRA counsel acted ineffectively in this regard. He also offers a detailed discussion of why he "diligently filed" the present petition within 60 days of the date on which the claim could have first been presented, *i.e.*, after our Supreme Court denied his petition for allowance of appeal from the denial of his first PCRA petition. ***Id.*** at 12.

Initially, Appellant's assertion that his PCRA counsel acted ineffectively (by not amending his first petition to add this claim of newly discovered evidence) does not satisfy a timeliness exception. ***See Commonwealth v.***

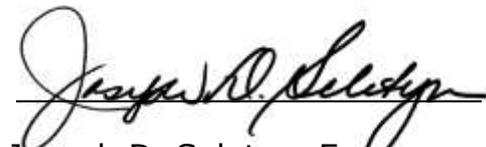
¹ Appellant does not state who discovered this 'new evidence.'

Wharton, 886 A.2d 1120, 1127 (Pa. 2005) (“It is well settled that allegations of ineffective assistance of counsel will not overcome the jurisdictional timeliness requirements of the PCRA.”) (citations omitted).

Additionally, Appellant’s argument that he did not know about the plaster cast penis until March of 2012 is belied by his own claim that he and the victim created the cast during their ‘mutually consensual’ relationship. If that claim is true, then Appellant obviously knew about the plaster cast *from the moment it was created*, not from the moment it was discovered by some unnamed, third-party in 2012. Consequently, Appellant has failed “to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence.” **Bennett**, 930 A.2d at 1271. The PCRA court did not err in denying his untimely petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016

