

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

WILLIAM J. TURNER,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 287 MDA 2015

Appeal from the PCRA Order November 14, 2013
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-2153-1980

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.:

FILED FEBRUARY 01, 2016

Appellant William J. Turner appeals from the order entered on November 14, 2013,¹ by the Honorable Thomas F. Burke, P.J.E., in the Court

¹ We note that a notice of appeal must be filed within 30 days of the entry of the order being appealed. **See** Pa.R.A.P. 903(a); Commonwealth v. Moir, 766 A.2d 1253 (Pa.Super. 2000). This Court may not extend the time for filing a notice of appeal. **See** Pa.R.A.P. 105(b). However, in a footnote to his Notice of Appeal dated January 5, 2015, and filed on February 2, 2015, Appellant indicates he did not receive the PCRA court's Order and Opinion denying his PCRA petition until "around" December 10, 2014. In support of his claim, Appellant attaches a photocopy of an envelope with a return address of Office of Court Administration and postmarked December 10, 2014, although a review of the certified docket entries does not reveal that the clerk of courts notified Appellant of the November 14, 2013, Order and Opinion at any time. In addition, in an Order filed on June 5, 2015, the PCRA court stated it never was served with notice that Appellant had filed an appeal of its November 14, 2013, Order and that it did not become aware of the pending appeal until May 22, 2015, when it received correspondence from this Court requesting overdue records in this matter. While the PCRA
(Footnote Continued Next Page)

*Former Justice specially assigned to the Superior Court.

of Common Pleas of Luzerne County dismissing his petition filed pursuant to the Post-Conviction Relief Act (“PCRA”)² as untimely. We affirm.

In 1982, the trial court sentenced Appellant to life in prison following his conviction of second-degree murder, and his conviction and sentence were upheld on direct review.³

In 1996, Appellant filed a PCRA petition alleging ineffective assistance of counsel. Specifically, Appellant maintained trial counsel had been ineffective for failing to relay the Commonwealth’s offer of a plea to third-degree murder. A PCRA hearing was held on February 3, 1997, at which time defense counsel Ferris Webby and Joseph Sklarosky, Sr. testified that the Commonwealth never presented a plea offer of third degree murder. In addition, Joseph Albert, lead counsel for the Commonwealth, testified that while Attorney Sklarosky had sought a plea for Appellant to voluntary

(Footnote Continued) _____

court noted its review of the docket revealed Appellant had filed an appeal on February 2, 2015, it made no mention of the untimeliness of this filing. Moreover, the Commonwealth does not address this procedural anomaly in its brief, but rather analyzes the issues as having been raised in a timely appeal. This Court has previously held that where the clerk of courts does not enter an order indicating that a post-sentence motion has been denied by operation of law and notify the defendant of the same, a breakdown in the court system occurred and we will not find an appeal untimely under these circumstances. **Commonwealth v. Repko**, 817 A.2d 549 (Pa.Super. 2003); **Commonwealth v. Perry**, 820 A.2d 734, 735 (Pa.Super 2003). Applying the same logic to the unique circumstances herein, we decline to quash the appeal and will proceed to Appellant's substantive issue.

² 42 Pa.C.S.A. §§ 9541-46.

³ Because we resolve this case on procedural grounds, a recitation of the facts underlying Appellant’s criminal conviction is not necessary.

manslaughter, he would not entertain such a plea, nor would he offer Appellant an opportunity to plead guilty to third-degree murder because he viewed the matter as a classic felony murder case which did not warrant an offer or acceptance of any plea to any charge less than second-degree murder.

Following the hearing, the PCRA court denied Appellant's petition, and this Court denied his appeal of that decision. In 2000, Appellant filed a Petition for Writ of Habeas Corpus, which the trial court subsequently denied. Appellant appealed, but he withdrew his appeal in 2001.

On March 22, 2012, Appellant filed the instant PCRA petition and twice amended it on April 26, 2012, and May 1, 2012, respectively. Therein, Appellant acknowledged the petition had been filed untimely but asserted it fell within several of the exceptions set forth in 42 Pa.C.S.A. § 9545(b)(1). In this regard he stated the following: "No subject matter jurisdiction for appellate courts yet exists (and) Petitioner was abandoned at sentencing for all appellate advocacy where failing to praecipe court to command clerk of courts to formally enter the sentence order of judgment into the docket for advocacy standing to trigger tolling for appeals to begin." **See** PCRA Petition, filed 3/22/12, at 3.

Appellant presented additional authority to support his claims in his April 26, 2012, addendum to his PCRA petition. In his May 1, 2012, addendum thereto, Appellant added the averment that defense counsel had

informed him in 1982 they should have taken the proffered third-degree murder plea bargain. Appellant maintained that he had obtained a letter memorializing such a plea offer, although he did not discuss the contents of such correspondence or attach it to his filing. **See** "Second Addendum/Amendment to Post Conviction Hearing Act Petition Timely Filed on February 22, 2012" at 4.

On December 28, 2012, the PCRA court filed its Notice of Intention to Dismiss Petition for Post Conviction Collateral Relief pursuant to Pa.R.Crim.P. 907, and Appellant filed his "Objections" to that notice on January 16, 2013. On November 14, 2013, the PCRA court denied Appellant's PCRA petition without a hearing upon finding that his petition was untimely filed and that he did not fulfill the requirements of the PCRA timeliness exception in Section 9545(b)(1)(ii) of the PCRA.

On appeal, Appellant presents the following question for our review:

Whether the PCRA court erred in not granting an evidentiary hearing to explore the probative value of Attorney Sklarosky's letter and why it was never disclosed or discussed at Appellant's prior evidentiary hearing before Judge Augello in February of 1998?

Brief for Appellant at 6.

Preliminarily, we must determine whether Appellant's PCRA petition and addendums thereto were timely filed, for it is well-settled that a trial court lacks jurisdiction to entertain an untimely petition. **Commonwealth v. Robinson**, 575 Pa. 500, 837 A.2d 1157 (2003). Our standard of review

of the denial of PCRA relief is whether the PCRA court's order is supported by the record and without legal error. ***Commonwealth v. Wojtaszek***, 951 A.2d 1169, 1170 (Pa.Super. 2008) (quotation and quotation marks omitted).

The most recent amendments to the PCRA, effective January 19, 1996, provide that a PCRA petition, including a second or subsequent one, shall 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 to be 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 the time for seeking review." 42 Pa.C.S.A. § 9545(b)(3).

The three statutory exceptions to the timeliness provisions in the PCRA allow for very limited circumstances under which the late filing of a petition will be excused. 42 Pa.C.S.A. § 9545(b)(1). To invoke an exception, a petition must allege and the petitioner must prove:

- (i) the failure to raise a claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or the law of this Commonwealth or the Constitution or law 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 Pennsylvania after the time period provide in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

“We emphasize that it is the petitioner who bears the burden to allege and prove that one of the timeliness exceptions applies.” ***Commonwealth v. Marshall***, 596 Pa. 587, 596, 947 A.2d 714, 719 (2008) (citations omitted).

Instantly, Appellant was sentenced on May 7, 1982, and this Court affirmed his judgment of sentence on February 10, 1984. On May 2, 1984, the Supreme Court denied Appellant’s petition for allowance of appeal. Therefore, Appellant’s judgment of sentence became final on August 2, 1984, ninety days after the Supreme Court denied his petition for allowance of appeal. **See** 42 Pa.C.S.A. § 9545(b)(3) (providing “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[]”); U.S.Sup.Ct.R. 13 (providing “a petition for a writ of *certiorari* seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the clerk within 90 days after entry of the order denying discretionary review[]”). Appellant filed the instant PCRA petition on March 22, 2012, making it is patently untimely.⁴

⁴ The 1996 amendments to the Post Conviction Relief Act providing for an additional one-year grace period in which to file a PCRA petition do not benefit him herein.

While he raised numerous other arguments in his PCRA petition and addendums thereto, before this Court Appellant essentially attempts to invoke the timeliness exception of 42 Pa.C.S.A. § 9545(b)(1)(ii) by claiming the letter he allegedly obtained following his PCRA hearing constitutes newly-discovered evidence. Our Supreme Court previously has explained that the newly-discovered fact exception in Section 9545(b)(1)(ii) requires a petitioner to allege and prove the existence of facts that were unknown to him and could not have been ascertained by the exercise of due diligence. **Commonwealth v. Bennett**, 593 Pa. 382, 393-396, 930 A.2d 1264, 1270-72 (2007). “Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced.” **Commonwealth v. Williams**, 35 A.3d 44, 52 (Pa.Super. 2011) (citations omitted).

Additionally, as this Court often has explained, all of the time-bar exceptions are subject to a separate deadline.

The statutory exceptions to the timeliness requirements of the PCRA are also subject to a separate time limitation and must be filed within sixty (60) days of the time the claim could first have been presented. **See** 42 Pa.C.S.A. § 9545(b)(2). The sixty (60) day time limit . . . runs from the date the petitioner first learned of the alleged after-discovered facts. A petitioner must explain when he first learned of the facts underlying his PCRA claims and show that he brought his claim within sixty (60) days thereafter.

Williams, 35 A.3d at 53 (citation omitted).

In his PCRA petition, Appellant indicated he was invoking the newly-discovered evidence exception to the PCRA's time bar under the authority of ***Maples v. Thomas***, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012),⁵ although he abandoned any discussion of that case in his appellate brief. Instead, the argument portion of his brief centers around a letter attached thereto as Exhibit "B." The correspondence, dated August 2, 1990, and addressed to Donelle A. Williams, Esquire, appears to have been penned by Attorney Sklarosky. Therein, Attorney Sklarosky advised Attorney Williams that the Public Defenders' Office was not able to garner an involuntary manslaughter plea from the Commonwealth. He further indicated that although Appellant had been apprised of the DA's "offer of third degree murder and the consequences of going to trial," Appellant "insisted on going to trial despite the fact that he might be found guilty of felony murder." Appellant claims this letter contradicts trial counsel's testimony during the hearing held on his first PCRA petition and posits the PCRA court erred in failing to hold an evidentiary hearing "to explore the letter's probative value and whether this would have altered the factual findings of a previous proceeding before Judge Augello." Brief for Appellant at 12.⁶

⁵ Therein, the Supreme Court of the United States held that a prisoner had been prevented from complying with a procedural rule of the state of Alabama due to his lawyer's abandoning him without notice.

⁶ Appellant further references in his brief his "Motion to Correct Fraud and Breakdown of the Courts in prior PCRA proceedings as void the Judgment" (*Footnote Continued Next Page*)

Appellant clearly did not file the instant PCRA petition presenting his newly-discovered fact claim within 60 days of when the claim could have been presented. He avers the August 2, 1990, letter became available to him “following the disposition of a prior PCRA evidentiary hearing.” Brief for Appellant at 11. As indicated *supra*, that hearing was held on February 3, 1997, and Appellant he did not raise the issue of the letter until he filed his second addendum to his PCRA petition on May 1, 2012. While the correspondence signed by Attorney Sklarosky seems to contradict his 1997 testimony, Appellant nowhere specifically indicates the date upon which he obtained this letter. Instead, he refers to the manner in which it allegedly helped to perpetrate a fraud upon the court and to issues of trial counsel’s ineffectiveness that were previously litigated. Thus, Appellant has failed to meet his burden of showing he filed his PCRA petition invoking the newly-discovered fact exception within 60 days of the date the claim first could have been presented. 42 Pa.C.S.A. § 9545(b)(2); ***Williams, supra***.

Moreover, Appellant has not proven that the correspondence could not have been ascertained with due diligence decades ago. Indeed, the focus of his PCRA hearing in 1997 was upon trial counsel’s alleged failure to relay a
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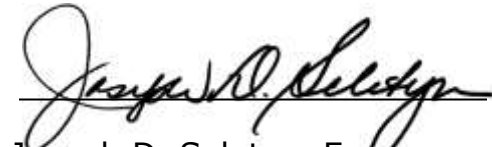
filed on May 23 2013, to which he attached this letter. While he faults the PCRA court for failing to consider this Motion in deciding his PCRA petition and subsequent amendments thereto filed in 2012, the Motion postdates the present PCRA petition and amendments; thus, it had not been before the PCRA court for consideration at that time.

plea offer to him. As such, we conclude the PCRA court did not err in dismissing Appellant's PCRA petition on the basis it was untimely filed.

Accordingly, because Appellant failed to prove the newly-discovered evidence exception to the timeliness requirements of the PCRA, the PCRA court properly dismissed his petition as untimely.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016