

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ADAM RICHARD MYERS,	:	
	:	
Appellant	:	No. 1442 MDA 2013

Appeal from the PCRA Order entered July 19, 2013
in the Court of Common Pleas of York County
Criminal Division, at No(s): CP-67-CR-0000908-2004,
CP-67-CR-0000909-2004, CP-67-CR-0001787-2004,
CP-67-CR-0002773-2004, CP-67-CR-0003550-2004,
CP-67-CR-0003551-2004, CP-67-CR-0003552-2004

BEFORE: BENDER, P.J.E., DONOHUE, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED APRIL 15, 2014**

Adam Richard Myers (Appellant) appeals from the July 19, 2013 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm in part, vacate in part, and remand for further proceedings consistent with this memorandum.

The relevant histories of the cases subject to this appeal are as follows. On June 16, 2004, Appellant pled guilty to counts of robbery, other theft-related crimes, simple assault, and terroristic threats at docket numbers 0908, 0909, and 2773 of 2004. Appellant was given an aggregate sentence of 10 to 20 years of imprisonment on August 25, 2004, and Appellant did not file a direct appeal.

* Retired Senior Judge assigned to the Superior Court.

On October 21, 2004, Appellant pled guilty to other theft-related crimes at docket numbers 3550, 3551, and 3552 of 2004. On December 13, 2004, Appellant was given an aggregate sentence of 9 to 18 years of incarceration, to run concurrently with his sentences at docket numbers 0908, 9090, and 2773 of 2004. Appellant filed no direct appeal in these cases.

At docket number 1787 of 2004, Appellant was convicted by a jury of theft-related crimes and assault. Appellant was sentenced to 8 to 16 years of imprisonment, to run consecutive to his other sentences. Appellant's judgment of sentence was affirmed by this Court on March 2, 2006, **Commonwealth v. Myers**, 898 A.2d 1131 (Pa. Super. 2006) (unpublished memorandum); and our Supreme Court denied allowance of appeal on September 29, 2006, **Commonwealth v. Myers**, 907 A.2d 1102 (Pa. 2006) (Table). Appellant did not seek review by the United States Supreme Court.

On September 17, 2007, Appellant filed a PCRA petition at docket number 1787 of 2004. Counsel was appointed and a hearing was held. Appellant's petition was denied by order of November 9, 2007. On November 13, 2008, this Court affirmed the PCRA court's disposition. **Commonwealth v. Myers**, 964 A.2d 945 (Pa. Super. 2008) (unpublished memorandum).

On April 16, 2012, Appellant filed a PCRA petition at all seven docket numbers, along with applications to proceed *in forma pauperis*. Counsel was

not appointed. On April 24, 2012, the PCRA court entered orders in all cases giving Appellant notice, pursuant to Pa.R.Crim.P. 907, of its intent to dismiss the petition as untimely filed. Appellant filed responses at all docket numbers on May 16, 2012. The PCRA court dismissed the petition as untimely at each docket number by order of May 24, 2012.

On May 31, 2013, Appellant filed, at each of the seven docket numbers, a motion for modification of sentence and/or correction of illegal sentence; a petition for the appointment of counsel; and a petition for leave to proceed *in forma pauperis*. On June 11, 2013, the PCRA court granted the petition to proceed *in forma pauperis* and notified Appellant of its intent to (1) view the motion as a PCRA petition,¹ and (2) dismiss the petition without a hearing. Appellant timely filed a reply to the notice. On July 19, 2013, the PCRA court entered an order on all seven dockets dismissing Appellant's petition.

Appellant timely filed a notice of appeal and concise statement of errors complained of on appeal, and the PCRA court filed an opinion pursuant to Pa.R.A.P. 1925(a). Appellant raises three questions for our review: (1) whether the PCRA court erred in its failure to appoint counsel;

¹ Appellant's 2013 motion properly was treated as a PCRA petition. ***Commonwealth v. Taylor***, 65 A.3d 462, 466 (Pa. Super. 2013) ("[A]ny motion filed after the finality of a sentence that raises an issue that can be addressed under the PCRA is to be treated as a PCRA petition."). Appellant acknowledged as much in the motion, referencing 42 Pa.C.S. § 9545(b)(2) therein, and claiming he filed his petition within 60 days of discovering new evidence. Accordingly, we hereafter shall refer to Appellant's May 31, 2013 motion as a PCRA petition.

(2) whether the PCRA court erred in failing to hold a hearing on newly-discovered evidence; and (3) whether the PCRA court erred in dismissing Appellant's petition. Appellant's Brief at 3.

"Our standard of review of a trial court order granting or denying relief under the PCRA calls upon us to determine 'whether the determination of the PCRA court is supported by the evidence of record and is free of legal error.'" **Commonwealth v. Barndt**, 74 A.3d 185, 192 (Pa. Super. 2013) (quoting **Commonwealth v. Garcia**, 23 A.3d 1059, 1061 (Pa. Super. 2011)).

Any PCRA petition, including second and subsequent petitions, must either (1) be filed within one year of the judgment of sentence becoming final, or (2) plead and prove a timeliness exception. 42 Pa.C.S. § 9545(b). "[T]he PCRA time restrictions are jurisdictional in nature; consequently, Pennsylvania courts may not entertain untimely PCRA petitions." **Commonwealth v. Watts**, 23 A.3d 980, 983 (Pa. 2011).

An indigent PCRA petitioner is entitled to appointed counsel for his or her first petition. Pa.R.Crim.P. 904(C). "A first-time petitioner must not be 'deprived of the opportunity of legally trained counsel to advance his position in acceptable legal terms.'" **Commonwealth v. Priovolos**, 746 A.2d 621, 623 (Pa. Super. 2000) (quoting **Commonwealth v. Hampton**, 718 A.2d 1250, 1254 (Pa. Super. 1998)). Indeed, even "a first-time PCRA petitioner whose petition appears untimely on its face is entitled to representation for assistance in determining whether the petition is timely or whether any

exception to the normal time requirements is applicable.” **Commonwealth v. Ramos**, 14 A.3d 894, 895 (Pa. Super. 2011) (citing **Commonwealth v. Guthrie**, 749 A.2d 502, 504 (Pa. Super. 2000), and **Commonwealth v. Stout**, 978 A.2d 984, 988 (Pa. Super. 2009)).

We first consider whether the PCRA court erred in disposing of Appellant’s 2013 PCRA petition without appointing counsel. The PCRA court did not appoint counsel to represent Appellant regarding his 2013 PCRA petition, although it determined that he is indigent, noting it was “his second PCRA concerning the above[-]listed cases.” PCRA Court Opinion, 10/9/2013, at 2. The Commonwealth agrees that Appellant was not deprived of counsel improperly, because Appellant “has already received the benefit of counsel in his first PCRA motion.” Commonwealth’s Brief at 13.

The record in these cases reflects that Appellant’s 2013 petition was his third PCRA petition filed in the case at docket number 1787 of 2004. Appellant was represented by appointed counsel in pursuing his first petition, which had been filed in 2007. Accordingly, we agree that the PCRA court did not err in proceeding with the disposition of the petition as to case number 1787 of 2004 without appointing counsel to represent Appellant.

The record further reflects that Appellant’s May 31, 2013 petition was his second PCRA petition filed in the other six cases at issue (0908, 9090, 2773, 3550, 3551, and 3552 of 2004). However, Appellant’s first PCRA

petition in each of these six cases was dismissed as untimely without the appointment of counsel.

We have held that if an indigent PCRA petitioner's first petition was adjudicated without counsel's having been appointed, he or she is entitled to appointed counsel in his or her subsequent PCRA proceeding. **See Commonwealth v. Davis**, 563 A.2d 932, 933 (Pa. Super. 1989) ("Here, because the prior post-conviction proceedings were uncounselled, the PCRA court should not have summarily dismissed the petition, but instead should have determined whether petitioner is indigent, and if so, whether his decision to proceed *pro se* in his initial petition was knowing and voluntary. ... If the court below determines that petitioner is indigent and that he did not knowingly and voluntarily waive his right to counsel in the prior proceeding, then new counsel should be appointed to assist him.").

As the PCRA court in the instant case determined that Appellant is indigent, it erred in denying Appellant's request for appointed counsel for the pursuit of his 2013 PCRA petition in case numbers 0908, 9090, 2773, 3550, 3551, and 3552 of 2004, for which he has never had the benefit of PCRA counsel. **Davis**, 563 A.2d at 933. Appellant is entitled to appointed counsel in all of his above-referenced cases except 1787 to determine "whether any exception to the normal time requirements is applicable" in those cases. **Ramos**, 14 A.3d at 895. Accordingly, we vacate the PCRA court's July 9,

2013 order so far as it dismissed Appellant's May 31, 2013 PCRA petition at docket numbers 0908, 9090, 2773, 3550, 3551, and 3552 of 2004.

Having held that Appellant was not entitled to appointed counsel for his petition filed at docket number 1787, we next consider whether the PCRA court properly determined that Appellant's 2013 PCRA petition in that case was untimely filed. Appellant's judgment of sentence became final in case 1787 at the end of 2006 and the instant petition was filed more than six years later. Accordingly, Appellant had the burden of pleading and offering to prove an exception to the PCRA's one-year filing requirement. Appellant attempted to invoke the following exception.

(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:

* * *

- (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....

* * *

- (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S. § 9545(b).

Appellant claimed in his petition that he filed it within 60 days of reading (1) an article from the April 2013 issue of *Graterfriends*, a publication of the Pennsylvania Prison Society, regarding application of the United States Supreme Court's decision in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012); and (2) an article from an internet site, mailed to him by his family, regarding maturation of the prefrontal cortex.

The article from *Graterfriends*, attached as Exhibit A to Appellant's petition, is written by an inmate at SCI Smithfield, who shares some of the arguments he raised in his brief filed on appeal from dismissal of his PCRA petition. The references therein are to 1991 versions of Pennsylvania statutes and to federal cases filed in 2011 and 2012. Exhibit B to Appellant's petition is a printout of a web page published by the U.S. Department of Health and Human Services. The article summarizes information about the prefrontal cortex. The portion of the article filed with Appellant's petition does not include the text of the footnotes found throughout the article.

Notably absent from Appellant's petition is any discussion of what efforts he took to discover the "new" facts contained in these articles.

The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner 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. Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have obtained the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced.

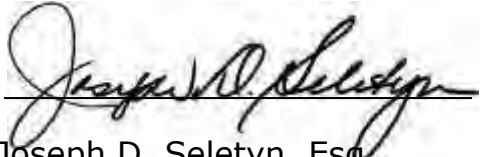
Commonwealth v. Monaco, 996 A.2d 1076, 1080 (Pa. Super. 2010) (citations omitted), *appeal denied*, 20 A.3d 1210 (Pa. 2011).

The Commonwealth notes that the “original dates of publishing for the [referenced] articles are indiscernible[;] thus [Appellant] is unable to properly plead that the articles, or even the scientific evidence supporting the articles, could not have been found through reasonable diligence.” Commonwealth’s Brief at 11. We agree that, while Appellant pled that he filed his petition within 60 days of reading the articles, the record before us provides no indication that the facts discussed in Appellant’s exhibits were not available to Appellant long ago had he exercised due diligence in investigating the issues. Accordingly, we hold that the PCRA court did not err in dismissing as untimely-filed Appellant’s 2013 PCRA petition as to case number 1787 of 2004. ***See, e.g., Commonwealth v. Marshall***, 947 A.2d 714, 720 (Pa. 2008) (“Exception (b)(1)(ii) requires [a] petitioner to allege and prove that there were facts that were unknown to him and that he could not have ascertained those facts by the exercise of due diligence. The focus of the exception is on [the] newly discovered facts, not on a newly discovered or newly willing source for previously known facts.” (internal quotation marks and citations omitted)).

Order affirmed in part and vacated in part. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.

J-S16045-14

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: 4/15/2014