



communicated desire to file an appeal, Attorney Sibley failed to file a Notice of Appeal within thirty days of this Order. See Pa.R.A.P. 903(a) (providing that the notice of appeal “shall be filed within 30 days after the entry of the order from which the appeal is taken.”).

Attorney Sibley thereafter filed a Motion to Reinstate Appellate Rights Nunc Pro Tunc (hereinafter, the “Motion to Reinstate”). Therein, she urged the PCRA court to reinstate Ginnery’s appeal rights, nunc pro tunc, due to her failure to file a requested appeal. In response, the PCRA court entered an Order on June 9, 2017, granting the Motion to Reinstate and directing counsel to file, within thirty days of the Order, a notice of appeal and Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal.

On July 10, 2017, Attorney Sibley filed a timely Notice of Appeal<sup>1</sup> and a Concise Statement. The PCRA court then issued a Rule 1925(a) Opinion.

On January 23, 2018, Attorney Sibley filed her Application to Withdraw as counsel with this Court.

Before addressing Ginnery’s claims, we must determine whether Attorney Sibley complied with the requirements of Turner/Finley in

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<sup>1</sup> July 10, 2017, was thirty-one days after the entry of the June 9, 2017 Order, thus making the Notice of Appeal facially untimely. See *In the Interest of J.M.P.*, 863 A.2d 17, 18, 20 (Pa. Super. 2004) (stating that a notice of appeal from an order reinstating appellate rights nunc pro tunc must be filed within thirty days of the reinstatement order, where, as here, the order expressly stated a deadline of thirty days). However, July 9, 2017, the thirtieth day, fell on a Sunday, thus extending the filing deadline to July 10<sup>th</sup>. See 1 Pa.C.S.A. § 1908 (extending deadline to first non-holiday weekday if final date falls on a weekend or holiday). Accordingly, Ginnery’s appeal is properly before us.

petitioning to withdraw as counsel. Pursuant to Turner/Finley, independent review of the record by competent counsel is required before withdrawal on collateral appeal is permitted. See *Commonwealth v. Pitts*, 981 A.2d 875, 876 n.1 (Pa. 2009). Such independent review requires proof of

- 1) A “no-merit” letter by PCRA counsel detailing the nature and extent of h[er] review;
- 2) The “no-merit” letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
- 3) The PCRA counsel’s “explanation”, in the “no-merit” letter, of why the petitioner’s issues were meritless;
- 4) The [PCRA] court conducting its own independent review of the record; and
- 5) The [PCRA] court agreeing with counsel that the petition was meritless.

*Id.* (citation and brackets omitted).

Here, Attorney Sibley indicated that she had reviewed the record, identified the issues that Ginnery seeks to raise, and explained why the issues lack merit. In addition, Attorney Sibley sent Ginnery copies of the Turner/Finley brief and Application to Withdraw, and sent him a letter (hereinafter, “the rights letter”) advising him of his rights to retain alternate counsel or to proceed pro se. See *Commonwealth v. Widgins*, 29 A.3d

816, 818 (Pa. Super. 2011).<sup>2</sup> Thus, we conclude that Attorney Sibley has substantially complied with the procedural requirements necessary to withdraw as counsel. See *Commonwealth v. Karanicolas*, 836 A.2d 940, 947 (Pa. Super. 2003) (holding that substantial compliance with the procedural requirements to withdraw as counsel will satisfy the Turner/Finley criteria).

We now independently review Ginnery's claims to ascertain whether they entitle him to relief.

In the Turner/Finley Brief, Attorney Sibley states that Ginnery wishes to raise the following issues for our review:

1. [Whether] [t]he [PCRA court] erred as a matter of law when [it] determined that [Ginnery's PCRA] claim was time-barred[?]
2. [Whether] [t]he [PCRA court] erred as a matter of law when [it] ruled [that] the [decision in] *Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013)[,] did not announce a new constitutional right [that] was to be retroactively applied[?]

Turner/Finley Brief at 2 (unnumbered).<sup>3</sup> As Ginnery's issues are related, we will address them together.

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<sup>2</sup> Technically, Attorney Sibley should have attached the rights letter to her Application to Withdraw, instead of attaching it to the Turner/Finley Brief. See *Widgins*, supra. However, because Attorney Sibley provided Ginnery with the rights letter, which complies with the requirements of case law, see, e.g., *Commonwealth v. Muzzy*, 141 A.3d 509, 511 (Pa. Super. 2016), we will overlook this defect.

<sup>3</sup> Ginnery did not file a separate pro se brief, nor did he retain alternate counsel for this appeal.

“In reviewing the denial of PCRA relief, we examine whether the PCRA court’s determination is supported by the record and free of legal error.” *Commonwealth v. Miller*, 102 A.3d 988, 992 (Pa. Super. 2014) (citation omitted). “The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level.” *Id.* (citation omitted).

As an initial matter, we observe that the PCRA court concisely set forth the relevant law regarding the PCRA’s timeliness requirement, and the relevant exceptions to the one-year time bar, which we incorporate as though fully set forth herein. See PCRA Court Opinion, 4/5/17, at 2-3. We additionally note that Ginnery’s instant PCRA Petition is facially untimely, as he filed it approximately 2½ years after his judgment of sentence became final. See 42 Pa.C.S.A. § 9545(b)(1).

Ginnery argues that the PCRA court erred in denying his second PCRA Petition, where “the statute under which he was convicted, Megan’s Law III,<sup>[4]</sup> was found unconstitutional in [] *Neiman*, [*supra*], and that therefore[,] his conviction for failing to register [as a sex offender] under that statute must be struck down.” *Turner/Finley Brief* at 3 (unnumbered) (footnote added). Ginnery further argues that “*Neiman*’s striking down of Act 152 should be given retroactive application.” *Id.* at 4 (unnumbered).

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<sup>4</sup> See P.L. 1243 No. 152 (2004) (hereinafter, “Act 152” or “Megan’s Law III”) (declared unconstitutional by *Neiman*, 84 A.3d at 613, 616).

In its Opinion, the PCRA court concisely addressed Ginnery's claim, discussed Neiman and the relevant law, and determined that (1) the PCRA's jurisdictional time bar precludes consideration of Ginnery's Neiman claim; and (2) even if Neiman did create a new constitutional right to meet an exception to the time bar, the decision is unavailing to Ginnery since Neiman has not been held to be retroactive. See PCRA Court Opinion, 4/5/17, at 4-5. We agree with the PCRA court's sound rationale and determination, and thus affirm on this basis in concluding that the PCRA court properly denied Ginnery's second PCRA Petition as being untimely. See *id.*<sup>5</sup>

Moreover, our independent review of the record has revealed no

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<sup>5</sup> Moreover, even if we were to hold that the Neiman decision constituted an exception to the PCRA's time bar, it would nevertheless not entitle Ginnery to collateral relief because he did not file his instant PCRA Petition "within 60 days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2). To comply with the sixty-day requirement, Ginnery had to file his PCRA Petition within sixty days from the date of the Neiman decision, December 16, 2013, not sixty days from the date he became aware of the decision. See *Commonwealth v. Cintora*, 69 A.3d 759, 763 (Pa. Super. 2013). Ginnery failed to do so.

meritorious claims that Ginnery could have raised on appeal,<sup>6</sup> and we agree with Attorney Sibley that this appeal lacks merit. Accordingly, we grant Attorney Sibley's Application to Withdraw and affirm the PCRA court's Order denying Ginnery's second PCRA Petition.

Application to Withdraw granted. Order affirmed.

Judgment Entered.

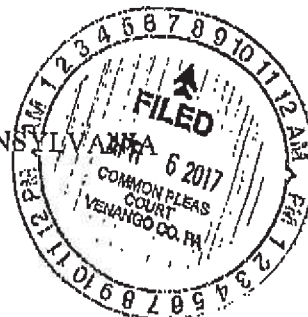


Joseph D. Seletyn, Esq.  
Prothonotary

Date: 6/15/2018

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<sup>6</sup> We acknowledge that Ginnery previously alleged, in his pro se letter to the PCRA court dated March 28, 2014, a claim of his prior PCRA counsel's ineffectiveness for failing to file a requested petition for allocatur with the Pennsylvania Supreme Court (i.e., concerning this Court's affirming the Order denying his first PCRA Petition). However, Attorney Sibley explains that Ginnery abandoned this claim on appeal. See Turner/Finley Brief at 1 (unnumbered) (wherein Attorney Sibley stated that she "determined ... that the underlying matters for which [Ginnery] expected prior [PCRA] counsel to appeal did not have merit, and therefore[, Ginnery] agreed with [Attorney Sibley] to proceed only with regard to the constitutionality claim" under Neiman); see also PCRA Court Opinion, 4/5/17, at 4 (stating that "while Ginnery has pled a potentially ineffective act of counsel (i.e., [prior PCRA counsel's] failure, possibly unwarranted, to file a petition for allowance of appeal with the Supreme Court), he has not met his burden of proving that act[.]" i.e., since he abandoned this claim) (emphasis in original).



IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

CR. No. 253-2009

OWEN E. GINNERY, SR.,

OPINION OF COURT

AND NOW, this 5<sup>th</sup> day of April, 2017 the Court has for consideration an Amended Motion for Post Conviction Collateral Relief, filed by the Defendant/Petitioner Owen E. Ginnery, Sr. *See generally* 42 Pa. C.S.A. §§ 9541 – 9546 (“the PCRA” or “the Act”). Hearing thereon was scheduled for November 22, 2016, at which time Pamela Logsdon-Sibley, Esquire, appeared on behalf of Ginnery. Brenda Servidio, Esquire, appeared on behalf of the Commonwealth. Based on a review of the record, and for the reasons that follow, the requested relief will be denied.

Following a bench trial, Ginnery was convicted on August 10, 2009 of three separate offenses, one of which is presently relevant; namely, Count 1, Failure to Comply with Registration of Sexual Offender Requirements, a Felony 3. *See* 18 Pa. C.S.A. § 4915(a)(1) (West, 2006). Ginnery was sentenced by this Court on September 28, 2009 to twenty seven (27) to eighty four (84) months incarceration. He subsequently filed a direct appeal, which was denied by the Non-Precedential Decision of the Superior Court on June 3, 2011. An initial timely PCRA petition was filed on January 5, 2012. Matthew Parson, Esquire, was appointed to represent Ginnery and an amended Petition was filed July 12, 2012. A hearing on Ginnery’s first PCRA



petition held, after which his first PCRA petition was dismissed on December 28, 2012. Appeal to the Superior Court followed. This Court's dismissal of Ginnery's first PCRA was affirmed by the Superior Court's Non-Precedential Decisions of February 3, 2014.

The instant proceedings were initiated by Ginnery's March 28, 2014 letter which alleges, *inter alia*, that his PCRA counsel failed to pursue discretionary review with the Pennsylvania Supreme Court despite having been instructed to do so. Ginnery subsequently supplemented this letter with an additional letter as well as a self-styled "Petition for Review." By letter dated September 4, 2014, Ginnery was informed that, pursuant to Pa.R.Crim.P. 576, no action would be taken on his *pro se* filings while he had counsel of record. Attorney Parson was copied on the correspondence and was directed to make an appropriate filing. Attorney Parson filed a motion to withdraw on September 4, 2014, which this Court granted the following day. Mr. Ginnery proceeded to file an additional supplemental letter on November 16, 2015, and filed a form PCRA petition on December 23, 2015. This Court appointed current counsel on December 30, 2015, and directed the filing of an amended petition. The Amended Petition came on September 2, 2016.

PCRA petitions must ordinarily be filed within one year of the date at which judgment becomes final, 42 Pa. C.S.A. § 9545(b)(1). A facially-untimely Petition can be considered only when it fits the criteria for one of the Act's specifically-enumerated timeliness exceptions. *Commonwealth v. Miller*, 102 A.3d 988, 992-993 (Pa. Super. 2014). The Act's timeliness requirements are jurisdictional in nature; as such, if a petition is facially untimely and no exception to the time-bar applies, the court lacks jurisdiction to entertain the petition. *Id.* Two such exceptions bear upon our analysis here. First, the "newly-discovered facts" exception exists where "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). Ineffective acts of counsel such as abandonment can constitute new "facts" for the purposes of § 9545(b)(1)(ii). See *Commonwealth v. Huddleston*, 55 A.3d 1217, 1220 (Pa. Super. 2012). Second, the "new constitutional right exception" exists where "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 [one year of petitioner's judgment becoming final] and has been held by that court to apply retroactively." 42 Pa. C.S.A. § 9545(b)(1)(iii). Any petition that invokes an exception to the timeliness requirements of the Act must nevertheless "be filed within 60 days of the date the claim could have been presented." *Id.* at § 9545(b)(1)(iii).

In our Order of December 30, 2015, this Court initially determined that pleadings of the instant PCRA petition adhered to the timeliness requirements of the Act, at least to the extent that the Petition was premised upon his first PCRA Counsel's failure to file for discretionary review with the Pennsylvania Supreme Court. See, e.g., *Commonwealth v. Leibel*, 825 A.2d 630, 635-36 (Pa. 2003) (post-conviction's failure to file for discretionary review resulted in denial of petitioner's rule-based right to counsel); See also *Commonwealth v. Rigg*, 84 A.3d 1080, 1088 (counsel must file for discretionary review when directed to do so, and at a minimum must consult with client about whether to appeal non-frivolous issues). This finding was premised upon our finding that the Petitioner's second PCRA was effectively initiated by the filing of his March 28, 2014 letter. Because this letter was submitted to the Court within "60 days of the date" of Attorney Parson's alleged failure to request the Supreme Court to review Ginnery's first PCRA petition as directed, we found that Ginnery alleged "new facts" which would grant us jurisdiction to consider his facially untimely petition as contemplated by 42 Pa. C.S.A. § 9545(b)(1)(ii). However, Ginnery's Amended Petition does not repeat the claim contained in his

previous filings that Attorney Parson was ineffective for failure to file a petition for allowance of appeal. Indeed, at the November 22, 2016 hearing, no testimony was taken from Attorney Parson, nor did Ginnery appear to testify on his own behalf. His current PCRA counsel simply appeared and gave legal argument on a different issue (discussed *infra*), relying on the state of the existing record. Accordingly, while Ginnery has *pled* a potentially ineffective act of counsel (*i.e.*, Attorney Parson's failure, possibly unwarranted, to file a petition for allowance of appeal with the Supreme Court), he has not met his burden of *proving* that act. Accordingly, his petition is untimely. *See* 42 Pa. C.S.A. § 9545 (b)(1) (timebar controlling unless "unless the petition alleges and the petitioner proves" one of the exceptions).

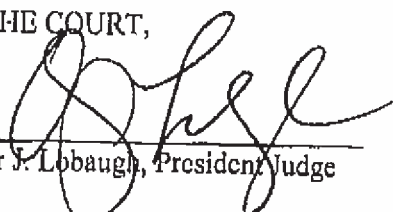
In any event, we see no merit in the error asserted by the Amended Petition. The offense for which Ginnery was convicted, 18 Pa. C.S.A. § 4915(a), was enacted pursuant to Section 1 of Act 152 of 2004, P.L. 1243. Among various other things, Act 152 amended a series of registration requirements for persons convicted of certain sexual offenses, and also provided criminal sanctions for registrants who failed to follow those requirements. Collectively, these specific provisions were referred to as "Megan's Law III." The Amended Petition's sole assertion is that Ginnery's conviction cannot stand in light of *Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013). In *Neiman*, the Pennsylvania Supreme Court held that Act 152 of 2004 was unconstitutional for the reason that it violated the Single Subject Rule of Article III, Section 3 of the Pennsylvania Constitution. *Id.* at 615-16. The Court directed that its decision be stayed for 90 days so as to provide the legislature the opportunity to enact "similar provisions in a manner consistent with the Constitution." *Id.* at 616. Indeed, by the time *Neiman* was decided, 18 Pa. C.S.A. § 4915 had already been replaced by Section 1 of the Sexual Offender Registration and Notification Act ("SORNA"), No. 111 of 2011, P.L. 446, *codified as amended* 18 Pa. C.S.A. §

4915.1. The Legislature moreover responded to the *Neiman* Court's ruling vis-à-vis the registration requirements of Megan's Law III by re-enacting them pursuant to Act 19 of 2014, P.L. 41. As such, the *Neiman* Court's striking-down Megan's Law III's criminal sanctions had very little proscriptive effect. *See Neiman*, 84 A.3d at 615 n. 31. Ginnery's Amended Petition, on the other hand, asserts that his conviction cannot stand because *Neiman* must be given retroactive effect.

We find that the PCRA's jurisdictional timebar precludes our review of the Petitioner's *Neiman* issue. The Petitioner's invocation of *Neiman* is timely only to the extent he can plead and prove the "new constitutional rule" exception to the timebar. *See* 42 Pa. C.S.A. 9545(b)(1)(iii) (in order to avail oneself of . We do not agree, first of all, that *Neiman* involved the announcement of a "new constitutional right" as required by the Act; rather, *Neiman* merely involved the application of the Single Subject Rule so as to invalidate a statute. *See Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002) (petitioner must first plead and prove the existence of a new constitutional right). Even presupposing that *Neiman* did establish a new constitutional rule, it must nevertheless be pled and proved that *Neiman*'s rule "has been held" by the Pennsylvania Supreme Court to be retroactive. *Id.* at 501-502. We have been directed to no authority, controlling or otherwise, standing for the proposition that *Neiman* has ever been held retroactive by the Pennsylvania Supreme Court. Because his relied-upon "new constitutional right" has not been deemed retroactive by the Pennsylvania Supreme Court, Ginnery's Amended Petition cannot invoke the exception contained in 42 Pa C.S.A. § 9545(b)(1)(iii), and his Petition is therefore untimely, and we lack jurisdiction to effect the requested relief. .

For the foregoing reasons, we determine that Ginnery's Amended Petition is without merit. Accordingly, an Order denying the Amended Petition shall follow.

BY THE COURT,

  
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Oliver J. Lobaugh, President Judge

cc: B. Servidio, Esq.  
P. Logsdon-Sibley, Esq.