

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

LEONARD F. STOSSEL

Appellant

No. 1262 WDA 2012

Appeal from the PCRA Order July 19, 2012
In the Court of Common Pleas of Blair County
Criminal Division at No(s): CP-07-CR-0002497-2005

BEFORE: GANTMAN, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.:

FILED: May 22, 2013

Leonard F. Stossel brings this appeal from the order entered on July 19, 2012, in the Court of Common Pleas of Blair County, denying and dismissing his first petition filed under the Post Conviction Relief Act (PCRA),¹ after an evidentiary hearing. Based upon the following, we affirm.

Since the facts underlying the charges against Stossel for criminal attempt/unlawful contact with a minor, and criminal use of a communication facility,² to which he pleaded *nolo contendere*, have been recounted by this Court, and the procedural history of this case has been aptly summarized by

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541–9546.

² 18 Pa.C.S. §§ 901(a); 6318(a)(1), and 7512(a), respectively.

the PCRA court, we need not further discuss the background of this case.³ **See Commonwealth v. Stossel**, 944 A.2d 805 (Pa. Super. 2007) (unpublished memorandum); PCRA Court Opinion, 7/19/2012, at 1–2. **See also Commonwealth v. Stossel**, 17 A.3d 1286 (Pa. Super. 2011). The sole contention raised by Stossel is that the PCRA court erred in dismissing his PCRA petition as untimely.⁴ **See** Stossel’s Brief at 2.

The PCRA court has provided a thorough and well-reasoned discussion in support of its decision. **See** PCRA Court Opinion, *supra*, at 3–6 (explaining that Stossel failed to satisfy the PCRA’s timeliness exception, set forth at 42 Pa.C.S. § 9545(b)(1)(ii),⁵ as follows: (1) The decision in **Commonwealth v. Cruz**, 852 A.2d 287 (Pa. 2004), upon which Stossel relies, involved a defendant who had suffered a serious brain injury, and the Pennsylvania Supreme Court held that “in some circumstances, claims that were defaulted due to the PCRA petitioner’s mental incompetence may qualify under the statutory after-discovered evidence exception.” **Id.** at

³ We simply note that Stossel’s PCRA petition, filed on June 2, 2010, was patently untimely.

⁴ When Stossel filed his notice of appeal, he also filed a Pa.R.A.P. 1925(b) statement, contending that the PCRA court erred in dismissing his petition as untimely. **See** Stossel’s Rule 1925(b) Concise Statement, 8/14/2012.

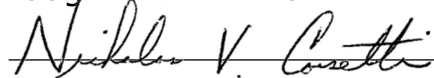
⁵ Section 9545(b)(1)(ii) provides an exception to the one-year time bar of the PCRA where “the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]” 42 Pa.C.S. § 9545(b)(1)(ii).

293; (2) As evidenced by the language of the **Cruz** holding, however, this exception is limited and has not been expanded, *i.e.*, **Commonwealth v. Monaco**, 996 A.2d 1076 (Pa. Super. 2010), *appeal denied*, 20 A.3d 1210 (Pa. 2011), and **Commonwealth v. Liebensperger**, 904 A.2d 40 (Pa. Super. 2006); (3) While medical records confirm that Stossel suffered from serious eye problems that impeded his vision, Stossel — unlike the defendant in **Cruz** — was able to understand what was occurring and meaningfully participate in his defense, and could have filed, or sought counsel to file, a timely PCRA petition; and (4) Even if there was merit to Stossel’s claim that his temporary blindness prevented him from filing his PCRA petition, Stossel testified he regained his vision in June, 2008, and his June, 2010 PCRA petition was not filed within 60 days⁶ from the discovery of additional evidence).

As we agree with the PCRA court’s sound rationale, we adopt its opinion as dispositive of the issue raised in this appeal. Accordingly, we affirm.

Order affirmed.

Judgment Entered.

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⁶ **See** 42 Pa.C.S. 9545(b)(1) (“Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.”).

J-S23019-13

Deputy Prothonotary

Date: 5/22/2013

The Defendant was represented by Attorney Thomas M. Dickey. In his PCRA petition, he alleged, *inter alia*, that Attorney Dickey rendered ineffective assistance of counsel; that his plea was unlawfully induced; that there is exculpatory evidence that was unavailable at the time of trial; and that certain representatives of the Pennsylvania Office of Attorney General committed perjury and falsified information in the prosecution of this case.

We entered an Order with Opinion on June 8, 2010 denying and dismissing the Petitioner's pro se PCRA Petition without hearing as being untimely. On or about June 21, 2010, the Petitioner timely filed an appeal to the Pennsylvania Superior Court. The Superior Court, in a decision filed April 12, 2011, vacated our June 8, 2010 Order and directed that we conduct a "Grazier" hearing [*See, Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998)]. We conducted such Grazier hearing on May 26, 2011, at which time the Petitioner confirmed that he desired to be appointed legal counsel to represent him relative to this initial PCRA proceeding. Therefore, that same date, we appointed Attorney Timothy S. Burns as PCRA counsel.

We conducted a status conference with counsel on October 17, 2011. A PCRA hearing was scheduled for December 16, 2011, and such was continued at the request of counsel. We conducted another status conference with counsel on January 19, 2012. The PCRA evidentiary hearing was scheduled for May 10, 2012, however, upon joint motion, the matter was continued until July 2, 2012.

The Petitioner testified during the July 2, 2012 proceeding. The issue to be decided is whether the Defendant's PCRA Petition, which undisputedly was filed more than one (1) year from the date that judgment became final, falls within one of the exceptions set forth in 42 Pa.C.S.A. §9545(b)(1). In addition to the Petitioner's testimony, the record was kept open to allow submission of medical records pertaining to the Petitioner. Those medical records were provided to the court under cover letter dated July 2, 2012 from Attorney Burns and have been marked as Petitioner's Exhibit "A" and are admitted and incorporated into the record.

Attorney Burns previously filed a memorandum of law on behalf of the Petitioner. We did not specifically request a memorandum of law from the Commonwealth and the Commonwealth has opted not to file such memorandum. We now proceed to disposition.

APPLICABLE LAW:

Any petition filed pursuant to 42 Pa.C.S.A. 9541 et seq., 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.A. 9545 (b)(1).

In order to satisfy timeliness requirements of the Post Conviction Relief Act (PCRA), defendant had to file PCRA petition within one year of the date on which time to file direct appeal to the Supreme Court expired, and filing after that date was untimely, where defendant's sentence became final when the Superior Court affirmed defendant's sentence and period for filing direct appeal to the Supreme Court expired. *Commonwealth v. Barrett*, 761 A.2d 145 (Pa. Super. 2000).

The timeliness restrictions of the Post Conviction Relief Act (PCRA) are jurisdictional and are to be strictly construed. *Commonwealth v. Stokes*, 959 A.2d 306 (Pa. 2008). Statutory time restrictions of Post Conviction Relief Act (PCRA) are mandatory and jurisdictional in nature, and may not be altered or disregarded to reach the merits of the claims raised in the petition. *Commonwealth v. McKeever*, 947 A.2d 782 (Pa. Super. 2008), *Commonwealth v. Geer*, 936 A.2d 1075 (Pa. Super. 2007), and *Commonwealth v. Taylor*, 933 A.2d 1035 (Pa. Super. 2007).

If a PCRA petition is untimely filed, a court lacks jurisdiction to address the claims contained therein. *Commonwealth v. Boyd*, 923 A.2d 513 (Pa. Super. 2007).

If the petition for post-conviction relief is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition. *Commonwealth v. Perrin*, 947 A.2d 1284 (Pa. Super. 2008).

Where a claim for post-conviction relief is not raised in a timely petition, the petitioner must allege and prove that one of the three exceptions to the timeliness requirements of the Post Conviction Relief Act (PCRA) applies. 42 Pa.C.S.A. 9545 (b)(1). *Commonwealth v. Hawkins*, 953 A.2d 1248 (Pa. 2008).

PCRA court was required to conduct threshold timeliness inquiry regarding filing of petition before court could address merits of petition; PCRA's timeliness requirements were jurisdictional in nature. *Id.*

Although a *Brady* violation may fall within the governmental interference exception to the one-year filing deadline of the PCRA, the petitioner must plead and prove that the failure to previously raise these claims was the result of interference by government officials, and that the information could not have been obtained earlier with the exercise of due diligence. *Id.*

DISCUSSION:

In order for a PCRA petition to be timely, it must be filed within one (1) year of the date that judgment becomes final. In this case, judgment became final on November 8, 2007. Therefore, in order for the Defendant's petition to be timely, it was to be filed by November 8, 2008. Because the Defendant's petition was not filed until June 2, 2010, it is untimely on its face. However, the Defendant claims that his petition is subject to an exception under 42 Pa. C.S.A. §9545. Specifically, the Defendant claims that his failure to file a timely petition is excepted by 42 Pa. C.S.A. §9545(b)(ii) which states:

(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.

As the plain language of the statute indicates, it is the Petitioner's "...burden to plead and prove that one of the above-enumerated exceptions applies." *Com. v. Sattazahn* 869 A.2d 529, 533 (Pa.Super.2005) (citing to *Com. v. Beasley* 741 A.2d 1258 (Pa. 1999)). If a petitioner claims that the facts underlying his claim were not known to him within the applicable time limits, it is important to note that while the statute is tolled, "[t]he sixty-day time period begins to run from the moment the evidence was discovered." *Com. v. Herrold* 776 A.2d 994, 998 (Pa.Super.2001).

As mentioned above, the Defendant has pled that his petition is subject to the second exception to the PCRA statute, which is often referred to as the "after discovered evidence" exception. Specifically, the Defendant has attempted to advance an argument utilizing the narrow holding of *Com v. Cruz* 852 A.2d 287 (Pa. 2004). In *Cruz*, the Defendant entered a plea of *nolo contendere* to three counts of murder. Despite the fact that the Defendant's judgment became final in 1994, his PCRA petition was not filed until six (6) years later. The Defendant claimed his

"...serious brain injury prevented him from knowing the facts upon which his substantive claim would be predicated. Counsel alleged that...it was only within six months of the filing of his *pro se* PCRA petition that appellant "returned" to a level of comprehension necessary to exercise his rights under the PCRA. Until that time, counsel argued, the facts that formed the basis for appellant's substantive claims were unknown to him in that they were not remembered or able to be applied in any meaningful way." *Id. at 291*.

The Court agreed with the Defendant, stating that "we are satisfied that, in some circumstances, claims that were defaulted due to the PCRA petitioner's mental incompetence may qualify under the statutory after-discovered evidence exception." *Id. at 293*.

As evidenced by the language of the Court's holding, however, this exception is limited and has not been expanded. This has been demonstrated by the relatively few cases which have been decided since *Cruz*. For example, in *Com v. Libensperger* 904 A.2d 40 (Pa. Super. 2006), the Defendant claimed that his untimely PCRA petition was subject to the after discovered evidence exception based upon the rationale of *Cruz*. The Defendant alleged that his chronic mental illness had rendered him unable to timely file his PCRA. The Court disagreed, explaining that "[t]he unique facts of *Cruz* allow us to distinguish it from the instant case. In *Cruz*, the appellant was essentially "lobotomized" as a result of a self-inflicted gunshot wound, and could not discuss the facts of his case. In our case, Appellant suffered no similar physical injury to his brain." *Id. at 47*. Essentially, the Court found that in *Cruz* the Defendant was unable to comprehend or discuss the facts of his case until he recovered from a serious head injury, which was in contrast to the Defendant in the current case, who merely cited mental illness as the reason for his untimely petition.

The same result was reached in *Com v. Monaco* 996 A.2d 1076 (Pa. Super. 2010), where the Superior Court again pointed out that "[o]nly under a very limited circumstance has the Supreme Court ever allowed a form of mental illness or incompetence to excuse an otherwise untimely PCRA petition. Thus, the general rule remains that mental illness or psychological condition, absent more, will not serve as an exception to the PCRA's jurisdictional time requirements." *Id. at 1081*. Given this, it is clear that *Cruz* was intended to be limited to those extreme circumstances in which a Defendant is truly unable to participate in his case or comprehend the proceedings. As such, the rationale of *Cruz* has not been applied to physical impairments, but has been limited to mental incompetence.

In the case currently before this Court, the Defendant has attempted to utilize the rationale of *Cruz* by claiming that, like Cruz's mental incompetence prevented him from filing a timely PCRA petition, the Defendant's temporary blindness prevented him from doing the same. While the submitted medical records confirm that the Defendant did in fact suffer from serious eye problems which impeded his vision, this is not sufficient to toll the PCRA timeliness requirements.

We find that the exception is not applicable to the instant case for two reasons. First, the Defendant, unlike the Defendant in *Cruz*, was able to understand what was occurring and meaningfully participate in his defense. Despite his eye problems, the Defendant could have filed or sought counsel to file a timely PCRA petition. Second, even if there was merit to the Defendant's claim that his temporary blindness prevented him from filing his PCRA petition, he testified that he regained his vision in June 2008. Despite this, the Defendant did not file his PCRA petition until June 2010, nearly two years later. The PCRA statute is clear that the Defendant must file his petition within sixty (60) days from the discovery of additional evidence. That clearly did not occur in this case.

Given the above, the Defendant's petition is untimely. Accordingly, we enter the following

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