

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JERRY DAVIS

Appellant

No. 2124 EDA 2012

Appeal from the PCRA Order July 25, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012610-2007

BEFORE: DONOHUE, J., MUNDY, J., and OLSON, J.

MEMORANDUM BY MUNDY, J.:

FILED MAY 24, 2013

Appellant, Jerry Davis, appeals from the July 25, 2012 order dismissing his first petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

We summarize the relevant facts and procedural history of this case as follows. On September 3, 2008, Appellant entered an open guilty plea to one count each of possession with intent to deliver a controlled substance (PWID) and possession of drug paraphernalia.¹ On October 6, 2008, the trial court imposed a sentence of five to ten years' imprisonment for the PWID charge, and the trial court imposed no further penalty for the drug

¹ 35 P.S. § 780-113(a)(30) and 35 P.S. § 780-113(a)(32), respectively.

paraphernalia charge. Appellant did not file a post-sentence motion or a direct appeal.

On August 6, 2010, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel, who filed an amended petition on January 12, 2012. The Commonwealth filed a motion to dismiss on May 7, 2012, arguing that the petition was facially untimely and Appellant had neither alleged nor proved an exception to the time-bar. On June 15, 2012, the PCRA court issued a notice of intent to dismiss Appellant's PCRA petition pursuant to Pennsylvania Rule of Criminal Procedure 907 on the basis of untimeliness as well as on the basis that the issues raised in Appellant's petition lacked merit. Appellant did not file a response, and the PCRA court dismissed Appellant's petition on July 25, 2012. On August 1, 2012, Appellant filed a timely notice of appeal.²

On appeal, Appellant raises one issue for our review.

- A. Whether [t]he [PCRA] court erred in denying [A]ppellant's [PCRA] petition where [A]ppellant's plea was not knowing and voluntary where it was revealed after his plea that the police officers involved in his arrest where [sic] subsequently prosecuted for selling narcotics?

Appellant's Brief at 5.

² Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

We begin by noting our well settled standard of review. “Our review of a PCRA court’s decision is limited to examining whether the PCRA court’s findings of fact are supported by the record, and whether its conclusions of law are free from legal error.” ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). “[Our] 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 PCRA court level.” ***Id.*** “The PCRA court’s credibility determinations, when supported by the record, are binding on this Court.” ***Commonwealth v. Spatz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). “However, this Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” ***Id.***

Before we may address the merits of Appellant’s claim, we must first consider the timeliness of his PCRA petition because it implicates the jurisdiction of both this Court and the PCRA court. ***Commonwealth v. Williams***, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.” ***Id.*** The PCRA “confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar[.]” ***Commonwealth v. Watts***, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). This is to “accord finality to the collateral review process.” ***Id.*** “A petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment

becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.” ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009). The act provides as follows.

§ 9545. Jurisdiction and proceedings

...

(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.

(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.A. § 9545(b).

As noted above, Appellant was sentenced on October 6, 2008 and Appellant did not file a direct appeal from his judgment of sentence. Thus, Appellant's judgment of sentence became final when the 30-day period for him to file a direct appeal expired on November 5, 2008. **See** 42 Pa.C.S.A. § 9545(b)(3). As such, Appellant had until November 5, 2009 to timely file his PCRA petition. The instant petition was not filed until August 6, 2010, therefore, it was facially untimely. After careful review of the certified record, we further agree with the PCRA court that Appellant "has failed to allege and prove an exception to the time-bar as required by [section] 9545(b)." PCRA Court Opinion, 11/1/12, at 3. As a result, the PCRA court lacked jurisdiction to consider Appellant's claim for relief under the PCRA.³ **See Williams, supra** at 52; **Harris, supra**.

³ Even if Appellant could show an exception to the time-bar, he would not be entitled to relief. The only claim Appellant raised was an after-discovered evidence claim. Appellant's Brief at 8-9; **see also** 42 Pa.C.S.A. § 9543(a)(2)(vi).

To obtain relief based on after-discovered evidence, appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted.

(Footnote Continued Next Page)

Based on the foregoing, we conclude the PCRA court properly dismissed Appellant's PCRA petition as untimely. Accordingly, the PCRA court's July 25, 2012 order is affirmed.

Order affirmed.

Judgment Entered.



Prothonotary

Date: 5/24/2013

(Footnote Continued) _____

Commonwealth v. Castro, 55 A.3d 1242, 1246 (Pa. Super. 2012) (*en banc*), appeal granted, --- A.3d ---, 2013 WL 1435234 (Pa. 2013); **accord Commonwealth v. D'Amato**, 856 A.2d 806, 823 (Pa. 2004).

Appellant avers the subsequent arrest of Philadelphia Police Officers who helped execute a search warrant in his case, James Venziale and Mark Williams, for selling drugs constituted after-discovered evidence. Appellant's Brief at 8-9. However, Appellant has not explained how the officers' arrest and conviction relate to his case. Officers Venziale and Williams were not among the witnesses the Commonwealth stated it would have called had Appellant not pled guilty and gone to trial. **See** N.T., 9/3/08, at 17-24. As the PCRA court noted, "[A]ppellant has failed to show a causal connection between his guilty plea colloquy and Officers Williams and Venziale's subsequent convictions." PCRA Court Opinion at 11/1/12, at 4. As a result, even if Appellant had gone to trial, he has not shown a use for officers' arrest and convictions other than to impeach their credibility if they were to testify. Therefore, Appellant would not be entitled to post-conviction relief. **Compare Castro, supra** at 1248 (concluding that evidence of corruption and arrest of officer "may be used to attack the veracity of [the officer's search] warrant and the evidence surrounding [the defendant]'s arrest ... [and] show[ed] that [the officer], the only witness to testify at [the defendant]'s trial, engaged in a pattern of fabricating controlled buys in order to procure and execute search warrants[)").

