

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
VAN JOHNSON,	:	No. 1483 EDA 2013
	:	
Appellant	:	

Appeal from the PCRA Order, April 9, 2013,  
in the Court of Common Pleas of Philadelphia County  
Criminal Division at No. CP-51-CR-1106161-1999

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STABILE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 24, 2014**

Van Johnson appeals, *pro se*, from the April 9, 2013 order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

Appellant and his co-defendant, Raheem Smith, initiated a shoot-out on a Philadelphia street, killing one man and wounding another. Following a jury trial, on April 17, 2002, appellant was convicted of first degree murder, attempted murder, aggravated assault, criminal conspiracy, and possessing an instrument of crime.<sup>1</sup> Appellant was sentenced to life imprisonment on the first degree murder conviction and various concurrent terms of imprisonment for the other convictions. Judgment of sentence was affirmed.

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<sup>1</sup> The first trial which took place ended with a hung jury and a mistrial was declared.

By way of a PCRA petition, appellant sought ***allocatur nunc pro tunc*** in the Pennsylvania Supreme Court; however, our supreme court denied his appeal on November 14, 2006. ***Commonwealth v. Johnson***, 863 A.2d 1225 (Pa.Super. 2004), ***appeal denied***, 911 A.2d 934 (Pa. 2006).

On August 3, 2007, appellant filed a ***pro se*** PCRA petition; and following the appointment of counsel, an amended petition was filed. The PCRA court issued notice pursuant to Pa.R.Crim.P., Rule 907, 42 Pa.C.S.A., and dismissed appellant's petition on April 14, 2009. On November 15, 2010, a panel of this court affirmed that dismissal. Appellant filed for allowance of appeal, which our supreme court denied on June 16, 2011. ***Commonwealth v. Johnson***, 22 A.3d 1057 (Pa.Super. 2010), ***appeal denied***, 23 A.3d 1055 (Pa. 2011).

On July 28, 2011, appellant filed the instant ***pro se*** PCRA petition. On March 4, 2013, the PCRA court issued a dismissal notice pursuant to Pa.R.Crim.P. 907, concluding that appellant's petition was untimely filed and the newly discovered evidence exception to the statutory one-year time bar was inapplicable. Appellant did not respond to the notice, and the petition was dismissed on April 9, 2013. (Docket #58.)

Appellant now brings this timely appeal. The following three issues are presented for our review:

- A. Appellant's constitutional right to Due Process was violated when the PCRA court dismissed his petition as untimely without conducting an evidentiary hearing.

- B. Appellant is entitled to a new Trial as a matter of State Law and on due process grounds on the basis of after-discovered exculpatory evidence which was unavailable at the time of trial.
- C. PCRA counsel was ineffective by failing to raise trial counsel's ineffectiveness for failing to object to Dr. Lieberman's testimony as Hearsay and raise direct appeal counsel's ineffectiveness for failing to raise [a] Batson violation.

Appellant's brief at i. Finding that the PCRA petition under review was untimely filed and that no valid exception to the time requirements of the PCRA exists, we affirm.

We begin our analysis with our standard of review.

This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA court's decision, 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 trial level.

***Commonwealth v. Brandon***, 51 A.3d 231, 233 (Pa.Super. 2012) (citation and quotation marks omitted).

A PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition. ***Commonwealth v.***

**Taylor**, 933 A.2d 1035, 1038 (Pa.Super. 2007), **appeal denied**, 951 A.2d 1163 (Pa. 2008).

Appellant's judgment of sentence became final on February 12, 2007, 90 days after our supreme court denied appeal and the time for filing a petition for writ of **certiorari** before the United States Supreme Court expired. **See** 42 Pa.C.S.A. § 9545 (b)(3); Rule 13, Rules of the United States Supreme Court. The PCRA court was correct in assessing that the instant petition, filed July 28, 2011, is manifestly untimely.

Notwithstanding the untimely nature of the petition, the PCRA provides for three exceptions to the one-year time bar. 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). This court has repeatedly stated it is the appellant's burden to allege and prove that one of the timeliness exceptions applies. **See, e.g., Commonwealth v. Beasley**, 741 A.2d 1258, 1261 (Pa. 1999). Appellant attempts to invoke the "after-discovered facts" exception to the time-bar. 42 Pa.C.S.A. § 9545(b)(1)(ii). The after-discovered facts exception includes a due diligence component. The PCRA requires that any petition invoking an exception must be filed within 60 days of the time the claim could first have been raised. **See** 42 Pa.C.S.A. § 9545(b)(2). A petitioner fails to satisfy the 60-day requirement of Section 9545(b) if he or she fails to explain why, with the exercise of due diligence, the claim could not have been filed earlier. **Commonwealth v. Breakiron**, 781 A.2d 94, 98 (Pa. 2001).

Appellant's after-discovered fact claim is premised on an affidavit signed by a private investigator, Walter P. Lee, III. Lee avers that he spoke to the doctor who prepared the autopsy report for the decedent, and the doctor indicated that there is a typographical error in the report concerning where the projectile was found in the body. We agree with the PCRA court that appellant has failed to demonstrate "reasonable diligence" in presenting the affidavits at issue. Appellant fails to address when and how he received the affidavits.<sup>2</sup> **See Commonwealth v. Vega**, 754 A.2d 714, 718 (Pa.Super. 2000) (60-day requirement of Section 9545(b)(2) not met when defendant failed to provide date on which he learned of evidence giving rise to after-discovered evidence claim). Nor does appellant explain why he could not ascertain the allegedly discovered information sooner; this too is fatal to his claim. **Commonwealth v. Yarris**, 731 A.2d 581, 589-591 (Pa. 1999) (after-discovered evidence exception not satisfied where appellant failed to demonstrate when alleged after-discovered evidence was actually discovered or why it could not have been ascertained through exercise of due diligence).

Appellant also complains that he was not accorded an evidentiary hearing. There is no absolute right to an evidentiary hearing on a PCRA petition. **Commonwealth v. Barbosa**, 819 A.2d 81, 85 (Pa.Super. 2003).

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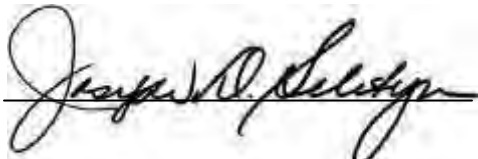
<sup>2</sup> Appellant merely states that he received copies of the affidavits on January 21, 2009, and January 26, 2009. (**See** appellant's brief at 9.)

If a court can determine from the record that no issues of material fact exist, then no hearing is necessary. ***Id.*** Under the circumstances of this case, the manifest lack of due diligence was apparent on the record and vitiated appellant's claimed exception. Thus, no hearing was needed. Moreover, since appellant's dilatory investigation left him without a valid exception to the time limits of the PCRA, the untimeliness of his petition remained unexcused, and the court was without jurisdiction to either conduct a hearing or resolve appellant's additional claims concerning PCRA counsel's ineffective assistance.

Since the provisions of the PCRA regarding timely filing are jurisdictional and we cannot ascertain whether appellant acted promptly and filed his PCRA petition within 60 days of discovering the alleged new facts, we cannot provide relief under the exception set forth at Subsection 9545(b)(1)(ii). Accordingly, having found that the PCRA court properly dismissed this petition as untimely, we affirm the order below.

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: 7/24/2014