

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ERIC STEWARD,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 48 WDA 2014

Appeal from the PCRA Order December 24, 2013
in the Court of Common Pleas of Erie County
Criminal Division at No.: CP-25-CR-0001483-2005

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED JULY 25, 2014

Appellant, Eric Steward, appeals *pro se* from the order of December 24, 2013, which dismissed as untimely his first petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. For the reasons discussed below, we affirm.

On June 29, 2005, Appellant pleaded guilty to two counts of indecent assault and one count of corruption of minors.¹ On August 17, 2005, the trial court sentenced Appellant to a term of seven years' probation. Appellant did not file a direct appeal.

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. §§ 3126(a)(1) and 6301(a)(1), respectively.

On January 30, 2008, the Commonwealth detained Appellant for violation of probation. On February 28, 2008, following a **Gagnon II**² hearing, the trial court found Appellant in violation and revoked his probation. The trial court sentenced Appellant to an aggregate term of incarceration of not less than two nor more than seven years. Appellant filed a timely direct appeal. On April 3, 2008, in response to the trial court's order directing Appellant to file a statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), counsel filed a statement of intent to file an **Anders**³ brief, which she served on Appellant. Subsequently, counsel filed an **Anders** brief and a petition for leave to withdraw as counsel with this Court. On August 5, 2008, in response to counsel's request, this Court discontinued the entire appeal without acting on the petition to withdraw.

On October 18, 2013, Appellant, acting *pro se*, filed the instant first PCRA petition, claiming ineffective assistance of appellate counsel and seeking reinstatement of his direct appeal rights. (**See** PCRA Petition, 10/18/13, at 2-3). The PCRA court appointed PCRA counsel on October 23,

² **See Gagnon v. Scarpelli**, 411 U.S. 778 (1973).

³ **See Anders v. California**, 386 U.S. 738 (1967); **Commonwealth v. McClendon**, 434 A.2d 1185 (Pa. 1981), *abrogated on other grounds by Commonwealth v. Santiago*, 978 A.2d 349, 361 (Pa. 2009).

2013. On November 15, 2013, counsel filed a **Turner/Finley**⁴ letter. On November 27, 2013, the PCRA court issued notice of its intent to dismiss the petition pursuant to Pennsylvania Rule of Criminal Procedure 907(1). On December 24, 2013, the PCRA court dismissed Appellant's PCRA petition; however, the PCRA court did not rule on counsel's request to withdraw. On December 27, 2013, while represented by counsel, Appellant filed a *pro se* notice of appeal. On January 6, 2014, the PCRA court issued an order directing Appellant to file a Rule 1925(b) statement and denying counsel's request to withdraw "pending the conclusion of [Appellant's] appeal." (Order, 1/06/14, at unnumbered page 1).

On January 13, 2014, Appellant filed a *pro se* petition requesting that the PCRA court permit counsel to withdraw and seeking leave to proceed *pro se* on appeal. The PCRA court properly forwarded the petition to counsel but otherwise did not take any action. **See Commonwealth v. Jette**, 947 A.2d 202, 204 (Pa. Super. 2008) (citing **Commonwealth v. Ellis**, 626 A.2d 1137, 1139 (Pa. 1993)) (observing that hybrid representation is not permitted in Pennsylvania).

On January 17, 2014, Appellant attempted to file a *pro se* Rule 1925(b) statement, which the PCRA court also forwarded to counsel. On January 27, 2014, counsel filed a Rule 1925(b) statement. **See Pa.R.A.P.**

⁴ **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

1925(b). On January 28, 2014, the PCRA court issued an opinion pursuant to Rule 1925(a) finding all of Appellant's issues waived on appeal for failure to file a Rule 1925(b) statement. On January 31, 2014, the PCRA court issued a second opinion, finding that the first opinion had been in error and directing this Court to its Rule 907 notice for a discussion of the merits of Appellant's claim. (**See** Memorandum Opinion and Order, 1/31/14, at unnumbered page 1).

Counsel never filed his appearance in this Court. On April 1, 2014, Appellant filed a *pro se* brief. Counsel did not file a brief. On June 27, 2014, this Court remanded the matter for an on-the-record colloquy concerning Appellant's request for leave to proceed *pro se* on appeal. **See *Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998).** The PCRA court held this colloquy on July 3, 2014, during which the trial court found that Appellant had made a knowing, intelligent, and voluntary waiver of his right to counsel on appeal. (**See** N.T. Hearing, 7/03/14, at 12; Right to Counsel Waiver, 7/03/14, at unnumbered page 1). Thus, Appellant's appeal is now properly before us.

On appeal, Appellant raises a single question:

A. Did the PCRA court erred [sic] in dismissing [Appellant's] PCRA petition were [sic] the petition invoked and [sic] exception to the one[-]year limitation rule?

(Appellant's Brief, at 2).

Our standard of review for an order denying PCRA relief is well-settled:

This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted). However, "if a PCRA [p]etition is untimely, a trial court has no jurisdiction to entertain the petition." ***Commonwealth v. Hutchins***, 760 A.2d 50, 53 (Pa. Super. 2000) (citations omitted).

Here, Appellant filed his first PCRA petition on October 18, 2013. The PCRA provides that "[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final[.]" 42 Pa.C.S.A. § 9545(b)(1). Appellant's judgment of sentence became final on August 5, 2008, the date Appellant discontinued his direct appeal. ***See Commonwealth v. McKeever***, 947 A.2d 782, 785 (Pa. Super. 2008) ((judgment of sentence final for PCRA purposes when appeal is discontinued voluntarily). Therefore, Appellant had one year, until August 5, 2009, to file a timely PCRA petition. Because Appellant did not file his current petition until October 18, 2013, the petition is facially untimely. Thus, he must plead and prove that his claim falls under one of the exceptions at Section 9545(b) of the PCRA. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

Section 9545 provides that the court can consider an untimely petition where the petitioner successfully 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.

Id. at § 9545(b)(1)(i)-(iii). Further, a petitioner who wishes to invoke any of the above exceptions must file the petition “within [sixty] days of the date the claim could have been presented.” **Id.** at § 9545(b)(2). The Pennsylvania Supreme Court has repeatedly stated that it is an appellant’s burden to plead and prove that one of the above-enumerated exceptions applies. **See, e.g., Commonwealth v. Abu-Jamal**, 941 A.2d 1263, 1268 (Pa. 2008), *cert. denied*, 555 U.S. 916 (2008). Here, Appellant alleges that his petition is timely under Section 9545(b)(1)(ii). (**See** Appellant’s Brief, at 10-11).

Appellant claims that, while appellate counsel informed him that she was seeking leave to withdraw from his appeal, she did not inform him that she was discontinuing the appeal. (**See id.** at 10). Appellant avers that he believed that some other counsel would take over the appeal and he did not discover until September 13, 2013 that this Court had discontinued his direct appeal on counsel’s *praecipe*. (**See id.**).

Appellant appears to seek to invoke the newly-discovered facts exception codified at 42 Pa.C.S.A. § 9545(b)(1)(ii) and discussed in the Pennsylvania Supreme Court's decision in ***Commonwealth v. Bennett***, 930 A.2d 1264 (Pa. 2007), which held that this exception refers not to after-discovered evidence but to facts that were previously unknown to the petitioner. ***See Bennett, supra*** at 1270. The Court in ***Bennett*** also held, in accord with the statutory language, that an appellant must prove that the facts upon which the claim is predicated could not have been ascertained earlier through the exercise of due diligence. ***See Bennett, supra*** at 1271. "A petitioner must . . . explain why his asserted facts could not have been ascertained earlier with the exercise of due diligence." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1041 (Pa. Super. 2007), *appeal denied*, 951 A.2d 1163 (Pa. 2008) (citation omitted).

In the instant matter, Appellant has not pleaded facts which demonstrate that he exercised due diligence in obtaining this information regarding the status of his direct appeal. (***See*** Appellant's Brief, at 10-11). "Our Supreme Court has held for purposes of 42 Pa.C.S. § 9545(b)(1)(ii) information is not 'unknown' to a PCRA petitioner when the information was a matter of public record." ***Taylor, supra*** at 1040 (citing ***Commonwealth v. Chester***, 895 A.2d 520, 523 (Pa. 2006)) (concluding that claim founded on arrest warrant in record of case was based on matter of public record that

due diligence would have disclosed to appellant long before filing of PCRA petition) (some internal quotation marks omitted).

Moreover, Appellant could have easily ascertained that this Court had discontinued his direct appeal by contacting either the trial court or this Court after August 5, 2008. Appellant did not do so. Rather, Appellant claims that he wrote letters⁵ to counsel that went unanswered. (**See** Appellant's Brief, at 10). Appellant failed to explain why he waited until September 2013, over five years after the filing of his direct appeal, to contact this Court. (**See id.**). This simply is not sufficient to demonstrate due diligence on the part of Appellant, particularly where he admits that he knew counsel was seeking leave to withdraw from representing him on direct appeal. **See Commonwealth v. Monaco**, 996 A.2d 1076, 1082-83 (Pa. Super. 2010), *appeal denied*, 20 A.3d 1210 (Pa. 2011) (holding newly-discovered facts argument did not save a time-barred PCRA petition where petitioner suspected the newly-discovered facts but took minimal steps to verify the information); (**see also** Appellant's Brief, at 8, 10).

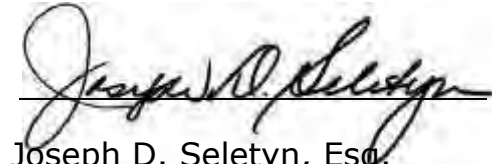
Thus, for the reasons discussed above, we hold that Appellant's petition is untimely and he has failed to prove an exception to the time bar. Accordingly, we affirm the denial of his PCRA petition. Because Appellant's

⁵We note that Appellant failed to attach any copies of the purported letters to counsel to his PCRA petition, and has not provided any specific information regarding the number of letters sent or the dates he mailed the letters.

petition is untimely with no statutory exception to the time bar pleaded or proven, the PCRA court was without jurisdiction to address the merits of Appellant's claims, and we are without jurisdiction to review them.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/25/2014