

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
KHARYEE MCCULLOUGH	:	
	:	
Appellant	:	No. 2347 EDA 2023

Appeal from the PCRA Order Entered August 9, 2023
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0009669-2010

BEFORE: LAZARUS, P.J., BECK, J., and STEVENS, P.J.E.*

MEMORANDUM BY BECK, J.:

FILED APRIL 29, 2025

Kharyee McCullough ("McCullough") appeals pro se from the order entered by the Philadelphia County Court of Common Pleas dismissing his serial petition pursuant to the Post Conviction Relief Act ("PCRA").¹ Because McCullough filed an untimely PCRA petition and failed to establish an exception to the statutory time bar, we affirm.

The trial court summarized the factual history of this case as follows:

On June 1, 2010, thirty-four[-]year-old Raymond Berry (decedent) was shot by [McCullough] and an unknown accomplice on the 3000 block of West Dakota Street in Philadelphia. The decedent died from multiple gunshot wounds. Video surveillance obtained by police from cameras at a nearby business captured the crime. In a formal statement, [McCullough] identified himself

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

as one of the shooters in the video. He declined to provide the identity of his accomplice.

In the video, the decedent is observed running. [McCullough] and his accomplice chase the decedent on bicycles in the same direction. The two men separate. Gunshot flashes are observed. Consistent with trace blood evidence at the scene, the unarmed decedent falls by a nearby vehicle, rises to his feet, and limps as he continues to run for his life. [McCullough] continues to shoot at the decedent before turning his bike around. Then, off camera, [McCullough]'s accomplice approaches from the other end of the street to deliver the fatal shots. [McCullough] admitted to hearing gunshots as he rode away from the crime scene.

Trial Court Opinion, 9/23/2014, at 2 (record citations omitted).

Following a bench trial, the trial court found McCullough guilty of third-degree murder, conspiracy to commit murder, firearms not to be carried without a license, carrying firearms on public streets in Philadelphia, and possession of instrument of crime. The trial court sentenced McCullough to an aggregate term of twenty-five to fifty years in prison. This Court affirmed his judgment of sentence, ***Commonwealth v. McCullough***, 2015 WL 7571959 (Pa. Super. Mar. 6, 2015) (non-precedential decision), and our Supreme Court denied his petition for allowance of appeal on August 19, 2015.

On September 9, 2016, McCullough filed a timely PCRA petition and the PCRA court appointed counsel. In his first PCRA petition, McCullough raised a single claim of ineffective assistance counsel. The PCRA court denied McCullough's petition and this Court affirmed on December 10, 2019. ***See Commonwealth v. McCullough***, 2019 WL 6716197 (Pa. Super. Dec. 10, 2019) (non-precedential decision).

The PCRA court summarized the remaining procedural history of this case as follows:

On July 17, 2020, [McCullough] filed, pro se, the instant PCRA petition[,], his second. [McCullough] then filed a counseled and amended PCRA petition on October 5, 2021. The Commonwealth filed a motion to dismiss the petition on January 4, 2022. [McCullough] then filed a supplement to the amended petition on October 28, 2022, and the Commonwealth filed a response on February 1, 2023.

[McCullough]'s second PCRA petition, as amended and supplemented, raises allegations of newly[-]discovered [fact] of police misconduct related [to several] Philadelphia police detectives involved in the underlying investigation (to varying degrees)[.]....

Upon review of the petition, as amended and supplemented, and the Commonwealth's responses thereto, [the PCRA court] determined that [McCullough]'s claims were untimely or without merit, and, on May 9, 2023, gave notice to all parties of the court's intention to dismiss the petition without an evidentiary hearing pursuant to Pennsylvania Rule of Criminal Procedure 907. [McCullough] filed a response to the 907 notice on May 26, 2023. [The PCRA court] then dismissed the petition and [McCullough] timely filed the instant appeal.

[McCullough] was ordered to file a Pennsylvania Rule of Appellate Procedure 1925(b) statement of matters complained of on appeal, and [he] complied on October 10, 2023.

PCRA Court Opinion, 12/4/2023, at 2-3 (formatting modified).

McCullough presents the following issues for review:

I. Did the PCRA court err in denying [McCullough]'s request for an evidentiary hearing on his [newly-discovered fact] claim with respect to the misconduct of Detective Baker?

II. Did the PCRA court err in dismissing [McCullough]'s [newly-discovered fact] claim with respect to the misconduct of Detectives Nordo and Peterman where [McCullough] alleged that his statement was coerced by the detectives?

III. Did the PCRA court err in denying [McCullough]’s request for an evidentiary hearing and dismissing [his newly-discovered fact] claim where [McCullough] learned that Detective Peterman had allowed improper evidence in another trial where he knew the defendant may have been innocent?

IV. Did the PCRA court err in concluding that the Detectives’ pattern and practice of misconduct in other cases was insufficient to compel the grant of an evidentiary hearing in this case?

McCullough’s Brief at 4 (unnecessary capitalization omitted; reordered for ease of review).

“We review the denial of PCRA relief by examining whether the PCRA court’s conclusions are supported by the record and free from legal error.” ***Commonwealth v. Johnson***, 289 A.3d 959, 979 (Pa. 2023). “[W]e defer to the factual findings of the post-conviction court, which is tasked with hearing the evidence and assessing credibility.” ***Id.*** Our standard of review of a PCRA court’s legal conclusions, however, is de novo. ***Id.***

The threshold question we must address is whether McCullough timely filed his second PCRA petition or, alternatively, whether he satisfied an exception to the statutory time bar. ***See Commonwealth v. Brown***, 141 A.3d 491, 499 (Pa. Super. 2016) (“Crucial to the determination of any PCRA appeal is the timeliness of the underlying petition. Thus, we must first determine whether the instant PCRA petition was timely filed.”) (quotation marks and citation omitted). “The timeliness requirement for PCRA petitions is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition.” ***Id.*** (quotation marks and citation

omitted); **see also Commonwealth v. Fantauzzi**, 275 A.3d 986, 994 (Pa. Super. 2022) (“the timeliness of a PCRA petition is jurisdictional and [] if the petition is untimely, courts lack jurisdiction over the petition and cannot grant relief”). The timeliness of a PCRA petition is a question of law, which we review de novo. **Commonwealth v. Callahan**, 101 A.3d 118, 121 (Pa. Super. 2014).

The PCRA sets forth the following mandates governing the timeliness of any PCRA 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.

42 Pa.C.S. § 9545(b)(1). A petitioner must file a petition invoking one of these exceptions “within one year of the date the claim could have been presented.” **Id.** § 9545(b)(2).

The Pennsylvania Supreme Court denied McCullough's petition for allowance of appeal on August 19, 2015. Thus, his judgment of sentence became final on November 17, 2015, when the ninety-day period for filing a petition for writ of certiorari with the United States Supreme Court expired. **See** U.S. S. Ct. R. 13.1 (allowing 90 days to petition for certiorari); 42 Pa.C.S. § 9545(b)(3). He therefore had until November 17, 2016, to file a timely PCRA petition. **See** 42 Pa.C.S. § 9545(b)(1). The instant PCRA petition, which McCullough filed on July 17, 2020, was facially untimely, and he concedes this point. **See** McCullough's Brief at 12. Accordingly, we must determine whether McCullough has pled and proven one of the timeliness exceptions of section 9545(b)(1). **See** 42 Pa.C.S. § 9545(b)(1).

In his first issue, McCullough argues that he has satisfies the newly-discovered fact exception to the PCRA's time bar because he discovered evidence relating to the prior police misconduct of Detective David Baker. **See** McCullough's Brief at 10-16. Detective Baker took the statement of Kareem Henderson-Gateward ("Henderson-Gateward"), the individual that implicated McCullough as one of the shooters in this case. **See id.** at 14-15. McCullough contends that evidence of Detective Baker's prior misconduct, which involved coercive interrogation tactics, supports Henderson-Gateward's claim that Detective Baker coerced him into implicating McCullough in this case by detaining him for more than twenty-four hours and denying him food, water, and use of the restroom. **Id.** at 15-16. McCullough asserts that without

Henderson-Gateward's statement, police would not have had probable cause to arrest him in this case. ***Id.***

The record reflects that in an unrelated case, the Philadelphia Police Department's Internal Affairs Division found that in April 1998, Detective Baker had improperly denied the subject of a homicide investigation his request for legal representation in an effort to get that individual to admit to his role in the murders. ***See*** Amended PCRA Petition, 10/5/2021, at Exhibit A. McCullough claims that he first learned of Detective Baker's misconduct from a fellow inmate on February 22, 2019, and filed the instant PCRA petition on July 17, 2020. ***See*** PCRA petition, 7/17/2020, at 4. Although McCullough filed the instant petition more than one year after he learned of Detective Baker's misconduct, he still filed it within one year of his first opportunity to do so. ***See*** Commonwealth v. ***Beatty***, 207 A.3d 957, 963 (Pa. Super. 2019) (explaining that "[w]here a prior petition is pending on appeal, a subsequent petition must be filed within the time limits set forth in [s]ection 9545(b)(2) as measured from the date of the order that finally resolves the appeal in the prior petition, because that date is the first date the claim could be presented").

McCullough fails to explain, however, why he did not raise a claim asserting that Henderson-Gateward's statement was the result of coercion prior to the instant PCRA petition. Our Supreme Court has recognized that the newly-discovered fact exception applies 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.” ***Commonwealth v. Small***, 238 A.3d 1267, 1280 (Pa. 2020) (quoting 42 Pa.C.S. § 9545(b)(1)(ii)).

In this case, McCullough conceded in his PCRA petition that he was aware Henderson-Gateward made a statement to police implicating him in the shooting. Amended PCRA Petition, 10/5/2021, ¶ 10. McCullough did not, either before the PCRA court or in his appellate brief, state exactly when he learned Henderson-Gateward made that statement or when he discovered that the statement was the product of coercion. Consequently, McCullough cannot explain why he could not have sooner ascertained the fact that Henderson-Gateward’s statement was the result of coercion by the exercise of due diligence. ***See Small***, 238 A.3d at 1280.

While it may be true that McCullough could not have discovered Detective Baker’s misconduct, which occurred in April 1998, until February 2019, the PCRA still requires him to plead and prove that he could not have sooner raised a claim specifically relating to Henderson-Gateward’s statement, particularly in light of the fact that he was aware of the statement. ***See id.*** Prior to the instant PCRA petition, however, McCullough never raised a single claim relating to Henderson-Gateward’s statement. Because McCullough failed to plead or prove that he exercised due diligence in bringing a claim that Henderson-Gateward’s statement was the product of coercion, his claim

regarding his discovery of evidence relating to Detective Baker's past police misconduct does not satisfy the newly-discovered fact exception to the PCRA.²

McCullough's second and third issues are related, as they involve instances police misconduct by Detective Philip Nordo, who was one of the detectives that transported McCullough to the homicide unit for questioning, and Detective Howard Peterman, who was one of the detectives that took McCullough's statement in which he implicated himself in the shooting in this case. **See** McCullough's Brief at 16-22. McCullough asserts that Detective Nordo, who had previously been found guilty of sexual and other misconduct in the course of his duties, sexually assaulted him in the interview room to intimidate him so that he would confess to his role in the shooting. **Id.** at 19-20. McCullough further asserts that Detective Peterman's prior misconduct casts doubt on whether McCullough's confession was, in fact, voluntary. **Id.** at 20-22.

² Additionally, we note that the certified record on appeal does not contain Henderson-Gateward's statement or any certification signed by Henderson-Gateward setting forth his allegations of coercion against Detective Baker or stating what he would have testified to in an evidentiary hearing before the PCRA court. **See** 42 Pa.C.S. § 9545(d)(1)(i). While McCullough set forth Henderson-Gateward's allegations in his supplemental PCRA petition, **see** Supplemental PCRA Petition, 3/15/2022, there is no record of McCullough providing the Commonwealth with Henderson-Gateward's name and address or detailing his efforts to obtain Henderson-Gateward's signature. **See** 42 Pa.C.S. § 9545(d)(1)(ii). Such shortcomings on McCullough's part would render Henderson-Gateward's testimony inadmissible. **See id.** § 9545(d)(1)(iii).

With respect to Detective Nordo, the record reflects that he was indicted in 2019 and subsequently convicted of numerous sex offenses and other forms of misconduct that he committed in the course of his duties as a homicide detective and that these convictions impacted several criminal prosecutions. **See** PCRA Court Opinion, 11/15/2024, at 8 n.4; **see also** Amended PCRA Petition, 10/5/2021, Exhibit F. Although evidence of Detective Nordo's prior crimes and misconduct would arguably corroborate McCullough's claim that Detective Nordo sexually assaulted him and intimidated to get him to confess to the shooting in this case, the evidence of the misconduct does not constitute a newly-discovered fact in the context of McCullough's case. McCullough's allegations of sexual assault and misconduct against Detective Nordo were not previously unknown to McCullough, as he alleged that the conduct occurred just before he made his statement to police, and thus, he would have known about them from that time. **See** Amended PCRA Petition, 10/5/2021, Exhibit C.

Prior to the filing of the instant PCRA petition, however, McCullough at no point made any allegations of sexual or other misconduct on the part of Detective Nordo. Indeed, he concedes this point. McCullough's Brief at 19. Furthermore, although McCullough did file a pre-trial suppression motion in which he sought to suppress his police statement, he did so on the basis of the photo arrays and lineup procedures police utilized to identify him as a suspect and the amount of time police held him before he made his statement.

See Motion to Suppress, 8/26/2010; N.T., 12/16/2010, at 50-51. McCullough never alleged any threats or acts of verbal, physical, or sexual abuse on the part of any detective involved with his case. **See id.** He therefore now cannot prove that he exercised due diligence in bringing a claim regarding Detective Nordo's efforts to coerce his confession through sexual assault. **See Small**, 238 A.3d at 1280. As McCullough did not exercise due diligence in raising a claim that Detective Nordo's actions coerced him into confessing to the shooting, his claim relating to evidence of Detective Nordo's prior criminal acts and misconduct does not satisfy the newly-discovered fact exception to the PCRA.

Regarding Detective Peterman, the record reflects that he was accused in 2021, in an unrelated homicide case, of concealing impeachment evidence revealing that he promised a key witness that he would be released from custody as a reward for implicating the defendant in that case. **See** Second Supplemental PCRA Petition, 10/28/2022, ¶¶ 1-2. Although these allegations against Detective Peterman exist, McCullough has presented no evidence that a court ever made a finding of misconduct by Detective Peterman. **See id.**; **see also** PCRA Court Opinion, 11/15/2024, at 11. Thus, there is no evidence of misconduct on the part of Detective Peterman that could arguably support a newly-discovered fact claim.

Furthermore, assuming arguendo that Detective Peterman did commit misconduct in another case, McCullough has failed to articulate, either before

the PCRA court or on appeal, what misconduct Detective Peterman committed in this case.³ **See** McCullough's Brief at 19-22; **see also** Second Supplemental PCRA Petition, 10/28/2022. This Court has held that in order to satisfy the newly-discovered fact exception based on a police officer's misconduct in an unrelated matter, the petitioner must demonstrate a "nexus" between their case and the officer's misconduct in the unrelated case. **Commonwealth v. Foreman**, 55 A.3d 532, 537 (Pa. Super. 2012). Here, McCullough has failed to allege, let alone prove, any such nexus between Detective Peterman's alleged misconduct and this case. Accordingly, we conclude that evidence of Detective Peterman's alleged misconduct in another matter does not satisfy the newly-discovered fact exception to the PCRA's time bar.

³ McCullough asserts that Detective Peterman kicked him during his interrogation and that coerced his confession. **See** McCullough's Brief at 19. While McCullough referenced the kick in an exhibit to his amended PCRA petition, he did not contend that the kick coerced his confession. **See** Amended PCRA Petition, 10/5/2021, Exhibit C; **see also** Second Supplemental PCRA Petition 10/28/2022. He has therefore waived any claim relating to the alleged kick on appeal. **See Commonwealth v. Ousley**, 21 A.3d 1238, 1242 (Pa. Super. 2011) ("It is well-settled that issues not raised in a PCRA petition cannot be considered on appeal.").

Furthermore, like his claim regarding Detective Nordo's alleged sexual misconduct and intimidation in this case, McCullough would have been aware of the alleged kick when it occurred, and he did not raise a claim regarding the kick until now. Detective Peterman's alleged kick therefore cannot satisfy the newly-discovered fact section to the PCRA's time bar because McCullough did not exercise due diligence in bringing the claim. **See Small**, 238 A.3d at 1280.

Finally, McCullough argues that the PCRA court erred in dismissing his petition without a hearing. **See** McCullough's Brief at 15-16, 20, 22. McCullough asserts that the PCRA court should have afforded him a hearing to develop his claim because of the overwhelming number of instances of prior misconduct involving Detectives Baker, Nordo, and Peterman. **See id.** He also points out that the Commonwealth did not oppose holding a hearing in this case. **Id.** at 15-16.

We have recognized:

The PCRA court has discretion to dismiss a petition without a hearing when the court is satisfied there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by further proceedings. To obtain reversal of a PCRA court's decision to dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing.

Commonwealth v. Smith, 244 A.3d 13, 16 (Pa. Super. 2020) (quotation marks and citation omitted). We have also explained that "[a]n evidentiary hearing is not meant to function as a fishing expedition for any possible evidence that may support some speculative claim." **Commonwealth v. Grove**, 170 A.3d 1127, 1149 (Pa. Super. 2017) (quotation marks and citation omitted).

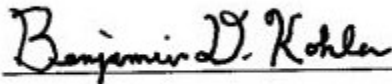
Here, McCullough has failed to highlight any genuine issues of fact that, if resolved in his favor, would entitle him to relief. **See** McCullough's Brief at 10-22. Instead, McCullough seeks a hearing as a fishing expedition so that

he can develop his newly-discovered fact claims that are entirely unsubstantiated. As we have already determined that the issues McCullough raised in this appeal are meritless, the PCRA court did not abuse its discretion in dismissing his petition without a hearing. Accordingly, McCullough's final issue fails.

As we conclude that the PCRA court's decision is supported by the record, we affirm the order dismissing McCullough's PCRA petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 4/29/2025