

2010 PA Super 157

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
V.	:	
	:	
JEFFREY WATSON,	:	
	:	
Appellant	:	No. 2859 EDA 2009

Appeal from the PCRA Order September 3, 2009,  
 In the Court of Common Pleas of Philadelphia County,  
 Criminal Division at No(s): 08504127011  
 CP-51-CR-0439251-1985

BEFORE: STEVENS, OTT and KELLY, JJ.

OPINION BY OTT, J.:

Filed: August 26, 2010

Jeffrey Watson appeals *pro se* from the denial of his third petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546.

We affirm.

After a bench trial in the Court of Common Pleas, Philadelphia County, Watson was found guilty on September 2, 1986, of first-degree murder, possessing instruments of crime (PIC), and aggravated assault.<sup>1</sup> Watson was immediately sentenced to life imprisonment.

Watson's direct appeal was denied on November 9, 1987, and the Pennsylvania Supreme Court denied his petition for allowance of appeal on March 8, 1988. Five years later, on May 19, 1993, Watson filed his first

<sup>1</sup> 18 Pa.C.S. §§ 2502, 907, and 2702, respectively.

PCRA petition, counsel was appointed and determined Watson's claim had no merit. The petition was dismissed on August 1, 1994.<sup>2</sup> The dismissal was not appealed.

Ten years later, on November 17, 2004, Watson filed his second PCRA petition. The petition was dismissed by the PCRA court and on August 3, 2007, this Court affirmed the dismissal. Watson did not petition for allowance of appeal to our Supreme Court.

The PCRA petition at issue herein, Watson's third, was filed on December 12, 2007. On May 5, 2008, the PCRA court issued notice to Watson, pursuant to Pa.R.Crim.P. 907, of its intent to dismiss the petition as untimely. The PCRA court dismissed the petition on September 3, 2009. This appeal followed.

In his third PCRA petition, Watson states his petition was not untimely as he did not gain access to the case of *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264 (2007)<sup>3</sup>, until October 23, 2007. Watson argues

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<sup>2</sup> The one-year time limit from the time of final sentence to filing of a PCRA was not yet in effect at this time.

<sup>3</sup> Our Supreme Court used *Bennett* to clarify the 42 Pa.C.S. § 9545(b)(1)(ii) exception. Appellant Bennett was entitled to application of the one-year time limit for his second PCRA where the facts upon which the claim is predicated were unknown to him and could not have been ascertained by due diligence. After the denial of his first PCRA, appellant's counsel (his trial counsel was appointed as his PCRA counsel) failed to file a 1925(b) brief. Appellant, who was incarcerated, did not have access to the public record indicating it had been dismissed.

**Bennett** affords him the right to reinstatement of his first PCRA petition *nunc pro tunc* because his PCRA counsel abandoned him when he did not appeal the dismissal.

The timeliness requirements of the PCRA are jurisdictional; this Court is without power to review an untimely petition. **See** 42 Pa.C.S. § 9545(b); **Commonwealth v. Fisher**, 582 Pa. 276, 285, 870 A.2d 864, 869 (2005). All PCRA petitions must be filed within one year of the date a judgment of sentence becomes final, unless the petitioner pleads and proves one of these three statutory exceptions: (1) interference by government officials in the presentation of the claim; (2) newly-discovered facts; or (3) an after-recognized constitutional right. 42 Pa.C.S. § 9545(b)(1)(i-iii); **Fisher**, 582 Pa. at 285-86, 870 A.2d at 869-70. A petition invoking one or more of these exceptions must be filed within 60 days of the date the claim first could have been presented. 42 Pa.C.S. § 9545(b)(2).

Watson argues the PCRA court had jurisdiction under the after-discovered evidence exception to the time bar. 42 Pa.C.S. § 9545(b)(ii).<sup>4</sup>

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<sup>4</sup> Section 9545 provides :

(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:

...

To invoke the after-discovered fact exception to the PCRA time-bar successfully, Watson must establish: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) the evidence is not being used solely to impeach credibility; and (4) the evidence would likely compel a different verdict. ***Commonwealth v. D'Amato***, 579 Pa. 490, 519, 856 A.2d 806, 823 (2004).

Watson argues the publication of ***Commonwealth v. Bennett*** on August 23, 2007 was the newly discovered fact which tolled the one-year time limitation. ***Bennett*** held, in relevant part, a PCRA petitioner is entitled to counsel through the appeal process and if counsel abandons the petitioner by not filing an appeal, the petitioner may be entitled to *nunc pro tunc* relief.

The first problem with Watson's argument is that new case law has never been held to qualify as a newly discovered fact. While we are unaware of any case law that specifically excludes case law from section

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(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.

42 Pa.C.S. §§ 9545(b)(1)(ii),(2).

(b)(1)(ii), we note the section has been otherwise defined by case law. In ***Commonwealth v. Pagan***, 597 Pa. 69, 950 A.2d 270 (2008), our Supreme Court reiterated the nature of an after-discovered fact as defined by ***D'Amato***. See ***Commonwealth v. Pagan***, 597 Pa. at 106, 950 A.2d at 292. What is notable is that the after-discovered "fact" is defined in terms of "evidence" and that the evidence must be likely to compel a different verdict in the event of a new trial. The relevant portion of ***Bennett*** addresses a procedural point. As it addresses procedure, ***Bennett*** cannot be seen as evidence, much less evidence that would compel a different verdict. Because it is not evidence and cannot fulfill the fourth requirement of ***D'Amato/Pagan*** it cannot be considered a newly-discovered fact. Therefore, we decline to extend the definition of after-discovered evidence or newly-discovered facts to include newly published case law. As a result, Watson has failed to clear the jurisdictional time bar.

Even if a new case were to be considered a newly discovered fact under section (b)(1)(ii), Watson would still not be entitled to relief. ***Bennett*** addresses the availability of *nunc pro tunc* relief in a situation where counsel has abandoned the client by failing to file an appeal. Here, counsel filed a

**Turner/Finley**<sup>5</sup> no-merit letter and was allowed to withdraw.<sup>6</sup> Once counsel is allowed to withdraw, there is no longer the duty to file the appeal.

Once counsel for the petitioner determines that the issues raised under the PCHA<sup>7</sup> are 'meritless,' and the PCHA court concurs, counsel will be permitted to withdraw and the petitioner may proceed on his own or with the aid of private counsel to pursue a review of the ruling entered, if he/she so wishes.

We therefore conclude that, when counsel has been appointed to represent a petitioner in post-conviction proceedings as a matter of right under the rules of criminal procedure and when that right has been fully vindicated by counsel being permitted to withdraw under the procedure authorized in *Turner*, new counsel shall not be appointed and the petitioner, or appellant, must thereafter look to his or her own resources for whatever further proceedings there might be.

**Commonwealth v. Maple**, 559 A.2d 953, 956 (Pa. Super. 1989) (interior citations omitted).

Watson was not abandoned by counsel, he was allowed to withdraw and had no further duty to file an appeal from the denial of a non-meritorious petition. **Bennett** does not apply to the instant circumstances.

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<sup>5</sup> **Commonwealth v. Turner**, 518 Pa. 491, 544 A.2d 927 (1988); **Commonwealth v. Finley**, 550 A. 2d 213 (1988).

<sup>6</sup> The official record in this matter is lacking. Although the **Turner/Finley** no-merit letter is not currently to be found in the record, Judge D. Webster Keogh specifically refers to the no-merit letter and subsequent dismissal of the first PCRA petition in his opinion dismissing Watson's second PCRA petition.

<sup>7</sup> Now, PCRA.

Because Watson has failed to demonstrate he is entitled to any of the one-year time limit exceptions, the PCRA court correctly determined it was without jurisdiction to act.

Order affirmed.