NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAMAL MCNEIL, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1014 EDA 2012

Appeal from the PCRA Order Entered March 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1106441-1995

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY BENDER, J.: Filed: February 5, 2013

Appellant, Jamal McNeil, appeals *pro se* from the March 1, 2012 order denying as untimely his third petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

Appellant was convicted by a jury on April 15, 1997, of third-degree murder, criminal conspiracy, and carrying a firearm in a public place. On June 17, 1997, he was sentenced to an aggregate term of ten to twenty years' incarceration. He filed a direct appeal and this Court affirmed his judgment of sentence on August 10, 1998. ***Commonwealth v. McNeil***, No. 2570 EDA 1997, unpublished memorandum (Pa. Super. filed August 10, 1998). Appellant did not petition for permission to appeal to our Supreme

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* Retired Senior Judge assigned to the Superior Court.

Court and, therefore, his judgment of sentence became final on September 9, 1998. ***See*** 42 Pa.C.S. § 9545(b)(3) (judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review); Pa.R.A.P. 1113(a) ("a petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days of the entry of the order of the Superior Court sought to be reviewed").

On January 28, 1999, Appellant filed his first *pro se* PCRA petition and counsel was appointed. However, his counsel subsequently petitioned to withdraw and filed a "no merit" letter in accordance with ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1998), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). On August 13, 2000, the PCRA court dismissed Appellant's petition and permitted counsel to withdraw. On appeal, we affirmed. ***Commonwealth v. McNeil***, No. 1272 EDA 2000, unpublished memorandum (Pa. Super. filed September 12, 2002).

Appellant filed a second *pro se* PCRA petition on December 26, 2007. After issuing notice of its intent to dismiss pursuant to Pa.R.Crim.P. 907, the court formally dismissed Appellant's petition on January 21, 2009. We affirmed the court's decision on February 23, 2010. ***Commonwealth v. McNeil***, No. 515 EDA 2009, unpublished memorandum (Pa. Super. filed February 23, 2010).

On June 24, 2010, Appellant filed his third *pro se* PCRA petition which underlies the instant appeal. On January 11, 2012, the PCRA court issued a Rule 907 notice of its intent to dismiss Appellant's petition without a hearing.

The court then issued an order formally dismissing his petition on March 1, 2012. Appellant filed a timely *pro se* notice of appeal. In the "Statement of the Questions Involved" portion of his brief, Appellant sets forth the following two issues for our review:

> I. Whether or not[] a civilized society could tolerate such a conviction [and] sentence?
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> II. Whether or not[] the imposition of an unauthorized statute constitutes [Appellant's] judgement [*sic*] of sentence as void?

Appellant's Brief at 4.

While Appellant purports to raise two issues on appeal, in the forty-page argument portion of his brief, we ascertain five separate arguments. Those contentions can be summarized as follows: (1) trial counsel acted ineffectively by not conducting a sufficient pretrial investigation or interviewing potential witnesses for the defense; (2) Appellant's counsel in his first PCRA proceeding was ineffective for failing to raise trial counsel's ineffectiveness; (3) the Commonwealth withheld evidence that Ms. West had a criminal record and was on probation at the time she testified against Appellant in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963); (4) Appellant's sentence is unlawful because the court erroneously applied a

weapons enhancement; and (5) Appellant has received affidavits from seven individuals which amounts to after-discovered evidence.[1]

This Court's standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 2007). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001).

We must begin by addressing the timeliness of Appellant's petition, because the PCRA time limitations implicate our jurisdiction and may not be altered or disregarded in order to address the merits of a petition. ***Commonwealth v. Bennett***, 930 A.2d 1264, 1267 (Pa. 2007) (PCRA time limitations implicate our jurisdiction and may not be altered or disregarded to address the merits of the petition); ***Commonwealth v. Johnson***, 803 A.2d 1291, 1294 (Pa. Super. 2002) (holding the Superior Court lacks jurisdiction to reach merits of an appeal from an untimely PCRA petition).

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[1] We note that we could decline to address several of these issues because they were not presented in Appellant's "Statement of the Questions Involved." ***See*** Pa.R.A.P. 2116(a) ("[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby"). However, because, for the reasons stated *infra*, we conclude that all of Appellant's claims are either untimely, waived, or previously litigated, we choose to dispose of them on these bases rather than find them waived due to briefing errors.

Under the PCRA, any petition for post-conviction relief, including a second or subsequent one, must be filed within one year of the date the judgment of sentence becomes final, unless one of the exceptions set forth in 42 Pa.C.S. § 9545(b)(1)(i)-(iii) applies. Here, Appellant's judgment of sentence became final on September 9, 1998, and thus, he had until September 9, 1999, to file a timely petition. Consequently, his petition filed in 2010 is facially untimely and, for this Court to have jurisdiction to review the merits thereof, Appellant must prove that he meets one of the exceptions to the timeliness requirements set forth in 42 Pa.C.S. § 9545(b). That section states, in relevant part:

> (b) Time for filing petition.—
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> > (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:
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> > > (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)(i)-(iii). Any petition attempting to invoke one of these exceptions "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2).

Instantly, Appellant initially presents ineffective assistance of counsel (IAC) claims. Specifically, he argues that his trial counsel was ineffective for failing to conduct an adequate pretrial investigation, including interviewing potential defense witnesses such as Mr. Logan. Relatedly, he avers that his PCRA counsel in his first petition for post conviction relief acted ineffectively in petitioning to withdraw rather than raising trial counsel's alleged ineffectiveness. These IAC arguments are untimely, previously litigated, and/or waived for our review. First, our Supreme Court has repeatedly declared that "a claim of ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits." ***Commonwealth v. Morris***, 822 A.2d 684, 694-95 (Pa. 2003) (citing ***Commonwealth v. Fahy***, 737 A.2d 214, 223 (Pa. 1999); ***Commonwealth v. Gamboa–Taylor,*** 753 A.2d 780, 785 (Pa. 2000); ***Commonwealth v. Lark,*** 746 A.2d 585, 589 (Pa. 2000); ***Commonwealth v. Peterkin,*** 722 A.2d 638, 643 n. 5 (Pa. 1998)). Therefore, we are without jurisdiction to examine these IAC arguments.

Moreover, even if Appellant's claims were timely, it appears that Appellant presented these same arguments in his second petition for post-

conviction relief and, consequently, they have been previously litigated.[2] ***McNeil***, 515 EDA 2009 at 6-7; 42 Pa.C.S. § 9544(a)(2) ("an issue has been previously litigated if…the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue"); ***Commonwealth v. Edmiston***, 851 A.2d 883, 887 (Pa. 2004) (claims that were previously litigated are not reviewable under the PCRA). Additionally, Appellant's ineffectiveness claims were not set forth in his instant PCRA petition; therefore, he is improperly attempting to raise these arguments for the first time on appeal. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Consequently, even if his IAC issues were timely, we would conclude that they have been previously litigated and/or waived.

Likewise, Appellant's third and fourth arguments are not reviewable because they have been previously litigated. Namely, Appellant alleges that the Commonwealth committed a ***Brady*** violation by withholding evidence

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[2] Appellant's IAC claims are intermingled with his other issues and are rather confusing. Therefore, we are compelled to note that to the extent Appellant may be attempting to raise specific IAC claims not previously ruled on, such arguments are waived because he could have presented them in his second PCRA petition. 42 Pa.C.S. § 9544(b) ("an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post[]conviction proceeding"); ***see also Commonwealth v. Grant***, 813 A.2d 726, 738 (Pa. 2002) (an ineffectiveness claim will be waived where "a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity").

that its key eyewitness, Ms. West, had a criminal record and was on probation at the time she testified against Appellant. Appellant also maintains that his sentence is illegal because the court improperly applied a weapons enhancement. This Court addressed each of these assertions in Appellant's appeal of the denial of his second PCRA petition and, consequently, we will not reexamine them herein. ***See McNeil***, 515 EDA 2009 at 3-7. [3]

Finally, Appellant contends that affidavits he received from seven individuals, including Maurice Logan and Robin Payne, amount to after-discovered facts satisfying the exception of section 9545(b)(1)(ii).[4] In Mr. Logan's affidavit, he claims that he witnessed two unidentifiable men commit the murder of which Appellant was convicted. Mr. Logan also states that he heard rumors that Ms. West lied in her testimony at Appellant's trial in order to obtain favorable treatment from the Commonwealth in her own unrelated

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[3] In his appeal from the denial of his second PCRA petition, we initially determined that Appellant's ***Brady*** claim failed to satisfy an exception to the PCRA time-bar and, thus, we did not have jurisdiction to review it. ***Id.*** at 3. However, we also evaluated Appellant's argument and concluded that even if timely, his claim was meritless. ***Id.*** at 6-7.

[4] While Appellant attached seven affidavits from various other individuals to his PCRA petition and brief to this Court, in his appellate brief, Appellant states that he "will not indulge" any affidavits other than those of Mr. Logan and Ms. Payne. Appellant's Brief at 28. Therefore, we consider Appellant as having abandoned any arguments relating to the other affidavits.

criminal cases. Ms. Payne's affidavit makes similar claims regarding Ms. West's fabricating her testimony and motivation for doing so.

The PCRA court concluded that these affidavits do not satisfy the after-discovered facts exception to the PCRA time-bar, reasoning:

> Initially, this [c]ourt notes that the documents relating to [Ms.] West's criminal history and possible bias were not only previously discoverable, but also previously known to [Appellant]. [Ms.] West's criminal history was the central focus of [Appellant's] second PCRA petition, which this [c]ourt and the [Superior] Court both deemed untimely.
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> Further, [Appellant] failed to show that the proffered unsworn statements were not previously discoverable via due diligence. [Appellant] presented seven statements mentioning a rumor that [Ms.] West, known by the nickname "Boongie," had "lied on" [Appellant] in return for favorable treatment in an unrelated case. Given that at least one of the statements specifies that the rumor was going on "in or around November 2007," there is no apparent reason [Appellant] could not have discovered this evidence prior to filing his second PCRA Petition on December 26, 2007. As such, any claim based upon [Ms.] West's alleged perjury is untimely.
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> ...
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> Finally, [Appellant] proffered a statement by Maurice Logan alleging that he was an eyewitness to the 1994 shooting at the center of this case. [Mr.] Logan claimed that he saw the victims Haskell Peak and Marshall Ockimey talking on the street with [Appellant] and Anthony Reaves when two unidentified gunmen ambushed all four of them. [Mr.] Logan stated that he never came forward because he "didn't want anyone putting pressure on me to testify," and "was affraid [*sic*] to come forward for a variety of reasons." These assertions are unconvincing, however, given that documents of public record show [Mr. Logan] had contact with [Appellant] in the period preceding [Appellant's] trial, where the two were codefendants in another shooting case that proceeded in parallel [to] this case. Furthermore, [Mr.] Logan's own statement [in his affidavit] suggests that he conveyed this information to [Appellant's] sister

> at some prior time. [Appellant] failed to provide any explanation [as to] why [the] information in [Mr.] Logan's statement could not have, with the exercise of due diligence, been obtained earlier.

PCRA Court Opinion, 5/1/12, at 7-8 (citations omitted).

Likewise, in his brief to this Court, Appellant provides no cognizable argument regarding why he could not have previously discovered the information that Ms. West fabricated her testimony and/or Mr. Logan witnessed two other men commit the murder. Accordingly, we agree with the PCRA court that Appellant has failed to plead and prove the applicability of the after-discovered facts exception to the PCRA time-bar. Consequently, we are without jurisdiction to review his claims. ***Bennett***, 930 A.2d at 1267.

Order affirmed.

Judge Colville concurs in the result.