NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
NATHANIEL RHODES, JR.,	:	
	:	
Appellant	:	No. 1053 EDA 2013

Appeal from the PCRA Order March 12, 2013,
Court of Common Pleas, Montgomery County,
Criminal Division at No. CP-46-CR-0008491-2003

BEFORE: GANTMAN, DONOHUE and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED DECEMBER 11, 2013**

Nathaniel Rhodes, Jr. ("Rhodes") appeals *pro se* from the March 12, 2013 order of the Court of Common Pleas, Montgomery County, dismissing without a hearing his second petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

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

> At the conclusion of a three-day jury trial that commenced on March 10, 2004, [Rhodes] was found guilty of three counts of [r]obbery and one count of [r]eceiving [s]tolen [p]roperty. The charges stemmed from a robbery at a 7-11 convenience store located at 1503 West Main Street in West Norriton, Montgomery County. On June 21, 2004, this court sentenced [Rhodes] to 25 to 50 years in prison under the three-strikes statute, pursuant to 42 Pa.C.S.A. [§] 9714(a)(2). [Rhodes] appealed a number of trial-related issues, and the Superior

> Court ultimately affirmed the judgment of sentence. Thereafter, the Supreme Court of Pennsylvania denied [Rhodes]'s request for discretionary review on October 25, 2005.
>
> [Rhodes] subsequently prosecuted a counseled PCRA petition that sought a new trial based on alleged trial counsel ineffectiveness. The Superior Court affirmed this court's denial of the petition in February 2008. […] .
>
> [][Rhodes] filed a second *pro* [] *se* PCRA on August 15, 2012, claiming he had discovered a Supreme Court case (***Commonwealth v. Shiffler,*** [583 Pa. 478,] 879 A.2d 185 ([]2005)) that warrants resentencing in his case. The court appointed Richard J. Tompkins, Esquire to review [Rhodes]'s *pro* [] *se* Petition to determine whether there was merit to his argument.
>
> After a conference with PCRA counsel, [Rhodes], and the Commonwealth present, Attorney Tompkins sent a no-merit letter on January 9, 2013. Accordingly, and after an independent review of the record, this court sent [Rhodes] a Notice of our intent to dismiss his PCRA Petition without a hearing. Subsequently, on March 11, 2013, this court denied the PCRA Petition without a hearing. [Rhodes] timely filed a Notice of Appeal. He since has complied with this court's directive to produce a Concise Statement of Errors pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

PCRA Court Opinion, 6/5/2013, at 1-2 (footnotes omitted).

On appeal, Rhodes presents the following issue for our review:

> I. Whether the [PCRA] / sentencing court erred in dismissing [Rhodes's] [PCRA] petition without an actual hearing on the sentencing issue, despite the fact that [Rhodes] is sentenced under mandatory sentencing statute 42 Pa.C.S.A. § 9714 'Three Strikes' Law, within which there is a provision in Section [] 9714(d) of this statute which provides that

> the offender has the right to petition the sentencing court for reconsideration of sentence, after sentencing, without time restrictions if one of the offender's predicate 'strikes' is vacated, of which is what the appellant has claimed in his *pro* [] *se* petition?

Appellant's Brief at 3.

"In reviewing a challenge to an order denying a PCRA petition, our standard of review is 'whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.'" ***Commonwealth v. McLaurin,*** 45 A.3d 1131, 1135 (Pa. Super. 2012) (citation omitted), *appeal denied*, __ Pa. __, 65 A.3d 413 (2013). "We must accord great deference to the findings of the PCRA court, and such findings will not be disturbed unless they have no support in the record." ***Commonwealth v. Scassera,*** 965 A.2d 247, 249 (Pa. Super. 2009) (citation omitted), *appeal denied*, 603 Pa. 709, 985 A.2d 219 (2009). Furthermore,

> the right to an evidentiary hearing on a post-conviction petition is not absolute. ***Commonwealth v. Jordan,*** 772 A.2d 1011, 1014 (Pa. Super. 2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. ***Id.***

Commonwealth v. Wah, 42 A.3d 335, 338 (Pa. Super. 2012).

As the PCRA court found that it was without jurisdiction over Rhodes's untimely petition, we likewise must first determine if we have jurisdiction to

decide this appeal. With respect to jurisdiction under the PCRA, this Court has stated:

> Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. The most recent amendments to the PCRA, effective January 16, 1996, provide a PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. A judgment is deemed final 'at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.'

Commonwealth v. Monaco, 996 A.2d 1076, 1079 (Pa. Super. 2010) (citations omitted), *appeal denied*, 610 Pa. 607, 20 A.3d 1210 (2011).

The trial court sentenced Rhodes on June 24, 2004. This Court affirmed his judgment of sentence on May 2, 2004, and our Supreme Court denied discretionary review on October 25, 2005. Pursuant to United States Supreme Court Rule 13, Rhodes had 90 days following the order denying discretionary review in which to file a writ of *certiorari* to the United States Supreme Court. Rhodes did not file a writ of *certiorari*, so his judgment of sentence became final on January 23, 2006. Thereafter, Rhodes had until January 23, 2007, to file a timely PCRA petition. Rhodes filed the instant PCRA petition on August 15, 2012, well beyond this deadline.

We may, however, review a PCRA petition filed more than one year after the judgment of sentence becomes final only if the claim falls within one of the following three statutory exceptions:

> **(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:
>
> > (i) the failure to raise the claim 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.A. § 9545(b)(1). Even if the petition alleges and proves one of the three exceptions listed above, the petition will not be considered unless it is "filed within 60 days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2). Furthermore, it is well settled that "[i]t is the appellant's burden to allege and prove that one of the timeliness exceptions applies." ***Commonwealth v. Hawkins,*** 598 Pa. 85, 93, 953 A.2d 1248, 1253 (2006) (citation omitted).

In his *pro se* petition, Rhodes asserts that his claim falls within the newly discovered facts exception to the PCRA's jurisdictional time-bar. Pro

Se Petition, 8/15/2012, at ¶ 5(c). Rhodes contends that he could not have known the basis for his claim because ***Commonwealth v. Shiffler,*** 583 Pa. 478, 879 A.2d 185 (2005), had not yet been decided at the time of his sentencing and direct appeal. ***Id.*** Rhodes asserts that his sentence is illegal because the trial court improperly sentenced him pursuant to the three strikes provision, 42 Pa.C.S.A. § 9714(a)(2),[1] when he was never sentenced as a second strike offender. ***Id.*** at ¶ 5(a); Appellant's Brief at 11, 14. According to Rhodes, our Supreme Court's decision in the ***Shiffler*** case means that his "first two previous [f]elony ('crimes of violence') convictions

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[1] Section 9714 regarding sentences for second and subsequent offenses states in relevant part as follows:

> **(a) Mandatory sentence.--**
>
> * * *
>
> (2) Where the person had at the time of the commission of the current offense previously been convicted of two or more such crimes of violence arising from separate criminal transactions, the person shall be sentenced to a minimum sentence of at least 25 years of total confinement, notwithstanding any other provision of this title or other statute to the contrary. Proof that the offender received notice of or otherwise knew or should have known of the penalties under this paragraph shall not be required. Upon conviction for a third or subsequent crime of violence the court may, if it determines that 25 years of total confinement is insufficient to protect the public safety, sentence the offender to life imprisonment without parole.

42 Pa.C.S.A. § 9714(a)(2).

count as one strike, not two, because all predicate convictions must happen in sequence (intervening opportunity to reform between convictions) for each conviction to count as a strike." Appellant's Brief at 12.

Rhodes alleges that he has satisfied the newly discovered fact exception based on his discovery of case law, *i.e.*, our Supreme Court's decision in ***Shiffler,*** 583 Pa. 478, 879 A.2d 185 (2005). Newly discovered case law, however, is not a newly discovered "fact" for the purposes of newly discovered fact exception. ***Commonwealth v. Cintora,*** 69 A.3d 759, 763 (Pa. Super. 2013). This Court has explained,

> Our Courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts which would invoke the protections afforded by section 9545(b)(1)(ii). ***See Commonwealth v. Watts,*** 611 Pa. 80, 23 A.3d 980, 986 (2011) (holding, a judicial opinion does not qualify as a previously unknown 'fact' capable of triggering the timeliness exception set forth in section 9545(b)(1)(ii) of the PCRA; 'section 9545(b)(1)(ii) applies only if the petitioner has uncovered facts that could not have been ascertained through due diligence, and judicial determinations are not facts'); ***Commonwealth v. Brandon,*** 51 A.3d 231, 235 (Pa. Super. 2012) (same).

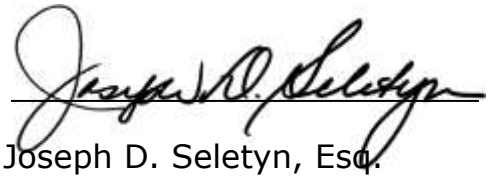
Id. Because Rhodes has failed to allege and prove that his petition falls within a timeliness exception, this Court lacks jurisdiction to review his claim. ***See Commonwealth v. Williamson,*** 21 A.3d 236, 243 (Pa. Super. 2011) (holding that this Court lacks jurisdiction to reach the merits of an appeal from the dismissal of an untimely PCRA petition not falling within any

exception to the PCRA time-bar); ***Commonwealth v. Taylor,*** 65 A.3d 462, 465-68 (Pa. Super. 2013) (finding this Court without jurisdiction to review an illegal sentencing claim raised in a untimely PCRA petition).

We accordingly affirm the dismissal of Rhodes's PCRA petition as untimely.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/11/2013