

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JOSEPH W. BURCH

Appellant

No. 1198 WDA 2012

Appeal from the PCRA Order July 5, 2012  
In the Court of Common Pleas of Crawford County  
Criminal Division at No(s): CP-20-CR-0000570-2008

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.\*

MEMORANDUM BY MUNDY, J.:

Filed: March 8, 2013

Appellant, Joseph W. Burch, appeals from the July 5, 2012 order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The relevant facts and procedural history, as set forth by the PCRA court, are as follows.

On November 3, 2008, [Appellant] pled guilty to Aggravated Indecent Child Assault, 18 Pa.C.S.A. § 3125(b), after allegedly digitally penetrating the genitals of victim, O.C. On January 5, 2009, [Appellant] pled guilty to Prohibited Offensive Weapons, 18 Pa.C.S.A. § 908(a), and Possession of Drug Paraphernalia, [35] P.S. § 780-113. [Appellant] was sentenced on February 26, 2009 to serve 120 to 240 months in prison for the

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\* Retired Senior Judge assigned to the Superior Court.

Aggravated Indecent Child Assault and 14 to 60 months in prison for the Prohibited Offensive Weapons and Paraphernalia charges.<sup>[1]</sup>

Subsequently, [Appellant] filed a *pro se* PCRA petition alleging ineffective assistance of counsel against Mr. Edward J. Hatheway, Esq., a plea of guilty unlawfully induced, and unavailability at the time of trial of exculpatory evidence. [Appellant] averred that Mr. Hatheway was ineffective for allegedly failing to discuss with [Appellant] the negative effects of Forensic Nurse Rhonda Henderson's (hereinafter "Nurse Henderson") report on her examination of the victim, failing to inform [Appellant] of the option of retaining an expert to independently examine Nurse Henderson's findings, and failing to inform [Appellant] of publications challenging Nurse Henderson's methods and findings in cases similar to [Appellant's].

[Appellant]'s PCRA [petition] was filed on October 18, 2010, approximately one year and eight months after [Appellant] was sentenced on February 26, 2009. Despite the fact that this petition was filed outside of the one-year period for filing a PCRA, [the PCRA court] permitted [Appellant] to proceed with his petition because Nurse Henderson's reports and examinations in cases similar to [Appellant]'s had been criticized.<sup>[2]</sup> [The PCRA court] entered an

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<sup>1</sup> Appellant did not file a direct appeal.

<sup>2</sup> On October 18, 2010, upon receipt of Appellant's *pro se* petition, J. Wesley Rowden, Esquire (Attorney Rowden), was appointed to represent Appellant. Additionally, Attorney Rowden was granted 60 days to file an amended PCRA petition on behalf of Appellant. Thereafter, on December 17, 2010, Attorney Rowden filed Appellant's amended PCRA petition. On January 10, 2011, upon review of Appellant's amended PCRA petition the PCRA court determined it was appropriate "to schedule the argument on the question of whether the issues raised are time-barred and/or whether an evidentiary hearing should be held[.]" PCRA Court Order, 1/10/11. Following said argument, the PCRA court determined Appellant's petition was untimely but  
(Footnote Continued Next Page)

order on April 7, 2011 granting PCRA counsel, J. Wesley Rowden, Esq., time to have Nurse Henderson's records, reports, and opinions evaluated by an expert. After granting a Motion to Continue Status Conference on August 17, 2011, a status conference was held on September 26, 2011 to decide the need for an evidentiary hearing.

A Memorandum and Order issued by [the PCRA court] on November 14, 2011 denied [Appellant]'s request for an evidentiary hearing .... In that Memorandum and Order, [the PCRA court] allowed [Appellant] 20 days to respond to the Order, and PCRA counsel filed a Response to the Judge's Intention to Dismiss the PCRA on December 2, 2011. Therein, [Appellant] alleged he could prove that he learned of the challenges to Nurse Henderson's credibility on August 11, 2010 and mailed "the required advisory to the appropriate source," on October 5, 201[0]. [Appellant]'s Response to Judge's Intention to Dismiss at ¶ 2. As a result, [the PCRA court] scheduled an evidentiary hearing for April 5, 2012 to address any new issues in this case and hear testimony regarding Mr. Hatheway's alleged ineffectiveness.

PCRA Court Opinion, 7/5/12, at 1-2.

On July 5, 2012, following the April 5, 2012 hearing, the PCRA court denied Appellant's PCRA petition on the basis that it was untimely. *Id.* at 5. Specifically, the PCRA court held that Appellant's PCRA petition was not filed until October 18, 2010, more than 60 days after Appellant discovered the alleged new fact on August 11, 2010. *Id.* at 4. Therefore, the PCRA court

*(Footnote Continued)* \_\_\_\_\_

determined that "the one issue that is not time-barred to be the question of whether there is after-discovered evidence that may afford [Appellant] some relief." PCRA Court Order, 3/15/11 at 4.

determined Appellant's petition was patently untimely, and that it lacked jurisdiction to address his PCRA petition. *Id.* On July 31, 2012, Appellant filed a timely notice of appeal.<sup>3</sup>

On appeal, Appellant raises the following issues for our review.

- I. Did the court commit reversible error by using the date the clerk of courts processed the petition, rather than the date when the petition was submitted to prison officials, to calculate if [] Appellant's petition is time barred?
- II. Should the Superior Court remand for an evidentiary hearing when the PCRA court's order scheduled a hearing to determine if counsel was ineffective, but dismissed the case as untimely?

Appellant's Brief at 8.

"Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." *Commonwealth v. Koehler*, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." *Id.* "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." *Commonwealth v.*

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<sup>3</sup> Appellant and the trial court have complied with Pa.R.A.P. 1925. The PCRA court adopts its November 14, 2011, and July 5, 2012 opinions in lieu of a Rule 1925(a) opinion. PCRA Court Order, 9/5/12.

**Spotz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). “However, this Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” *Id.*

Before we may address the merits of a PCRA petition, we must first consider the petition’s timeliness because it implicates the jurisdiction of both this Court and the PCRA court. **Commonwealth v. Williams**, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal denied*, 50 A.3d 121 (Pa. 2012). “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.” *Id.* The PCRA “confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act.” **Commonwealth v. Robinson**, 837 A.3d 1157, 1161 (Pa. 2003) (citation omitted). This is to “accord finality to the collateral review process.” *Id.* “A petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.” **Commonwealth v. Harris**, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227 (Pa. 2009). The act provides as follows.

**§ 9545. Jurisdiction and proceedings**

...

(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 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.

(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.A. § 9545(b).

As noted above, Appellant was sentenced on February 26, 2009, and did not file a direct appeal. As a result, Appellant's judgment of sentence became final on March 30, 2009, when the 30-day period for Appellant to file a direct appeal in this Court expired. *See id.* § 9545(b)(3). Appellant therefore had until March 30, 2010 to file a timely PCRA petition. Appellant

filed the instant petition on October 18, 2010, therefore, it is patently untimely. Appellant, however, acknowledges that his PCRA petition was facially untimely, but alleges an exception to the time-bar. Appellant's Brief at 13. Specifically, Appellant claims that the newly-discovered evidence exception, set forth by section 9545(b)(1)(ii), is applicable in the instant matter. *Id.*

Our Supreme Court has previously described a petitioner's burden under the newly-discovered evidence exception as follows.

[S]ubsection (b)(1)(ii) has two components, which must be alleged and proved. Namely, the petitioner must establish that: 1) "the *facts* upon which the claim was predicated were *unknown*" and 2) "could not have been ascertained by the exercise of *due diligence*." 42 Pa.C.S. § 9545(b)(1)(ii) (emphasis added).

*Commonwealth v. Bennett*, 930 A.2d 1264, 1272 (Pa. 2007). "Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced." *Williams, supra* at 53. Additionally, as this Court has often explained, all of the time-bar exceptions are subject to a separate deadline.

The statutory exceptions to the timeliness requirements of the PCRA are also subject to a separate time limitation and must be filed within sixty (60) days of the time the claim could first have been presented. *See* 42 Pa.C.S.A. § 9545(b)(2). The sixty (60) day time limit ... runs from the date the petitioner first learned of the alleged after-discovered facts. A petitioner must explain when he

first learned of the facts underlying his PCRA claims and show that he brought his claim within sixty (60) days thereafter.

*Id.* (some citations omitted).

Instantly, Appellant's *pro se* PCRA petition, filed on October 18, 2010, averred that Appellant had learned that in June 2010, Nurse Henderson "was cited for exaggerated [sic], embellished, and false reports of rape tests." Appellant's *Pro Se* PCRA Petition, 10/18/10, at 3. Notably, Appellant's petition fails to allege when he first learned this information. Additionally, a review of Appellant's amended PCRA petition also fails to state the date on which Appellant discovered the information regarding Nurse Henderson's reports. After receiving notice from the PCRA court of its intent to dismiss his petition for failure to assert an after discovered evidence claim within the 60-day timeframe, Appellant responded with the following argument.

The date I learned of the "after discovered evidence" that would prove my PCRA was on 8-11-10 and my time barred date was 10-9-10. I sent the required advisory to the appropriate source on 10-5-10, which is verified by the postage dates I have on record. I checked the case law stating time of arrival is marked as date sent. I was well within the time bar date.

Response to Judge's Intention to Dismiss, 12/2/11.

Additionally, it is Appellant's burden to "explain when he first learned of the facts underlying his PCRA claims and show that he brought his claim within sixty (60) days thereafter." *Williams, supra*. At the April 5, 2012



hearing, Appellant testified as follows about learning of the issue with Nurse Henderson's reports.

[Q.] ... I'm asking the date that you discovered that there was an issue where you could have had Mrs. Henderson's report.

[A.] That was the 11<sup>th</sup>.

[Q.] August 11<sup>th</sup> of 2010? Was that from Mr. Hatheway contacting you?

[A.] No.

[Q.] Apparently there was a letter sent to Mr. Hatheway in 2010. Did you ever know anything about that letter that was sent by the D.A. to Mr. Hatheway?

[A.] No.

[Q.] After you discovered August 11<sup>th</sup>, 2010 - - and apparently you read an article from the Erie Times News?

[A.] Yes.

[Q.] Was that the date of the article or is that when it came to your attention?

[A.] That's when it came to my attention. It was printed in Erie.

N.T., 2/5/12, 58-59. Based on Appellant's testimony, Appellant had until October 10, 2010, 60 days from August 11, 2010, to file his PCRA petition. As noted Appellant did not file his PCRA petition until October 18, 2010. Despite Appellant's averment on appeal, that he gave his petition to prison authorities on October 5, 2010, Appellant did not attach or supply the PCRA

court or this Court with proof of said filing.<sup>4</sup> As a result, this Court must consider Appellant's claim to be filed on October 18, 2010. Because Appellant's petition was not filed until October 18, 2010, Appellant has failed to meet his burden under section 9545(b)(1)(ii). *See Bennett, supra*. Thus, we conclude the PCRA court correctly denied Appellant's instant PCRA petition.

Based on the foregoing, we conclude the PCRA court properly determined it lacked jurisdiction to address Appellant's PCRA petition. Accordingly, the July 5, 2012 order denying said petition is affirmed.

Order affirmed.

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<sup>4</sup> Additionally, we note that Appellant alleges he gave the petition to prison authorities for the first time on appeal. Previously, Appellant had merely stated he gave the petition to the "appropriate source[,]" never specifying he gave it to prison officials. Response to Judge's Intention to Dismiss, 12/2/11. "[I]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Accordingly, on this basis alone we could deem Appellant's issue waived.