NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RONALD REED Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1224 EDA 2012

Appeal from the PCRA Order of February 29, 2012
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0000360-2002
CP-39-CR-0000832-2002

BEFORE: OLSON, J., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.: **FILED JUNE 05, 2013**

Ronald Reed ("Appellant") appeals from a February 29, 2012 order that dismissed his third petition for relief under the Post Conviction Relief Act ("PCRA").[1] We affirm.

Our court previously summarized the factual history of the case as follows:

> On November 8, 2002, after a jury trial, [Appellant] was convicted of murder of the first degree, rape, aggravated indecent assault, indecent assault, unlawful restraint, false imprisonment, simple assault, recklessly endangering another person, terroristic threats and possession of a weapon.[1] The

---

* Retired Senior Judge assigned to the Superior Court.

1 42 Pa.C.S.A. §§ 9541-46.

> convictions stem from [Appellant's] murder of his former paramour and the rape of his estranged wife.
>
> [1] 18 Pa.C.S.A. §§ 2502(a), 3121(1), 3125(1), 3126(a)(1), 2902(1), 2903, 2701(a)(3), 2705, 2706, and 907(b).
>
> On December 11, 2002, [Appellant] was sentenced to life in prison. On February 17, 2004, this Court affirmed the judgment of sentence. ***Commonwealth v. Reed***, 849 A.2d 609 (Pa. Super. 2004) (unpublished memorandum). On May 25, 2004, [Appellant] timely filed the instant PCRA Petition. . . . On December 22, 2004, the PCRA court denied [Appellant's] PCRA Petition.

Commonwealth v. Reed, 196 EDA 2004 (Pa. Super. 2004) (unpublished memorandum) (footnote omitted). We affirmed the denial of Appellant's first PCRA petition. ***Id.*** Appellant filed a second PCRA petition on January 23, 2007, which was also denied. Appellant did not appeal that order.

The instant PCRA petition was filed on October 6, 2011. Counsel was appointed. Counsel filed a motion to withdraw pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On February 29, 2012, the trial court granted counsel's motion to withdraw and dismissed Appellant's PCRA petition. This appeal followed.[2]

Before we reach the merits of Appellant's claims, we first must ensure that we have jurisdiction. It is well-established that the PCRA time limits are

---

[2] Appellant's notice of appeal was not docketed until April 3, 2012. However, it was post-marked March 29, 2012. As the prisoner mailbox rule applies, ***Commonwealth v. Jones***, 700 A.2d 423, 426 (Pa. 1997), Appellant's notice of appeal was timely filed.

jurisdictional, and that they apply to all PCRA petitions. ***Commonwealth v. Leggett***, 16 A.3d 1144, 1145 (Pa. Super. 2011).

A PCRA petition must be filed within one year of when the judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). Instantly, Appellant's judgment of sentence was entered on December 11, 2002. On February 17, 2004, his judgment of sentence was affirmed by this Court. Appellant's sentence became final on or about March 17, 2004, when the time expired for Appellant to file a petition for allowance of appeal with our Supreme Court. Pa.R.A.P. 1113(a). To be timely, a PCRA petition would have had to be filed on or about March 17, 2005. As Appellant's petition was filed October 6, 2011, it is facially untimely.

Despite facial untimeliness, a PCRA petition will be considered timely if the petitioner pleads and proves one of the three exceptions to the one-year time limit enumerated in § 9545(b), which provides:

> (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).

Here, Appellant alleged that a 2003 newspaper article raised facts unknown to him, enabling him to proceed under subsection (b)(1)(ii). PCRA Petition & Memorandum, 10/6/2011, ¶3. Appellant alleged that the article calls into question the reliability of the DNA evidence presented at his trial. ***Id.*** Appellant further alleged that he was unaware of the 2003 article until an associate brought it to his attention on or about August 23, 2011. ***Id.*** He also claimed that his mental illness prevented him from discovering the article sooner. ***Id.*** ¶5. To establish timeliness under section 9545(b)(1)(ii), he must plead and prove satisfaction of "a three-part test: 1) the discovery of an unknown fact; 2) the fact could not have been learned by the exercise of due diligence; and 3) the petition for relief was filed within 60 days of the date that the claim could have been presented." ***Commonwealth v. Smith***, 35 A.3d 766, 771 (Pa. Super. 2011).

At issue in this case is whether Appellant could have learned about the newspaper article through an exercise of due diligence prior to August 2011. A similar question was addressed by our Supreme Court in ***Commonwealth v. Fahy***, 959 A.2d 312 (Pa. 2008). In ***Fahy***, the appellant alleged that, in 2005, he became aware of evidence, including a 1997 magazine article,

about alleged bias in the jury selection process in Philadelphia. ***Id.*** at 315. Accordingly, the appellant sought to invoke the newly-discovered evidence exception to the PCRA time bar. ***Id.*** Our Supreme Court rejected the appellant's attempt, holding that the facts became public knowledge as of publication of the article and that, because the appellant presented nothing to indicate why those facts could not have been learned earlier with the exercise of due diligence, the exception to the time bar did not apply. ***Id.*** at 316-17.

The facts that Appellant claims are newly discovered in this case became public knowledge when the newspaper article was published in 2003. However, unlike the appellant in ***Fahy***, Appellant has offered an excuse as to why he could not have discovered these facts earlier. Specifically, Appellant claimed that his mental illness prevented him from discovering the article sooner.

In support of his argument, Appellant cites ***Commonwealth v. Cruz***, 852 A.2d 287 (Pa. 2004). In ***Cruz***, our Supreme Court held that, when proven, mental incompetence **may** satisfy the requirements of the newly-discovered evidence exception. ***Id.*** at 288 (emphasis added). In ***Cruz***, the petitioner had brain damage from a self-inflicted gun shot wound. We have summarized the ***Cruz*** Court's holding as follows:

> The petitioner entered a plea of *nolo contendere,* because according to his defense counsel he could not "discuss the facts of [his] case in any sort of sensible way," as a result of the injuries resulting from his suicide attempt. ***Id.*** at 328–29, 852 A.2d at 288. Despite the petitioner's condition, defense counsel

> did not claim incompetence, and no determination regarding the petitioner's competency was made. ***Id.*** at 329, 852 A.2d at 288. After nearly six years had passed, the petitioner filed a *pro se* PCRA petition, essentially alleging that he had only recently recovered from his self-inflicted gun shot wound to the degree of mental competency required to know and understand the facts of his case. ***Id.*** Therefore, the petitioner argued that he could submit his first PCRA petition only recently. ***Id.*** at 329–31, 852 A.2d at 289–90. The trial court held, and the Superior Court affirmed, that the petitioner's case did not qualify under the after-discovered evidence exception to the time bar of the PCRA. ***Id.*** at 333, 852 A.2d at 291.
>
> On appeal, the Supreme Court noted that there had not been any determination that the petitioner was incompetent or that he regained competency. ***Id.*** at 341, 852 A.2d at 297. Additionally, the Supreme Court noted that in the petitioner's case, it was indisputable that petitioner had sustained a serious brain injury that impaired his brain function, and that it takes time for such an injury to heal. ***Id.*** The Court further stated that the record contained nothing to sufficiently and definitively establish if and when the petitioner had passed from incompetence to competence, and that the petitioner had failed to prove that he was incompetent at the pertinent times, or that he had brought his claims during the sixty day window provided by the after-discovered evidence exception. ***Id.*** at 342, 852 A.2d at 297. The Court held that given the language of the exception coupled with the unique circumstances of the petitioner's case, the petitioner should be provided the opportunity to prove that he was incompetent at the relevant times, and that his incompetence qualifies under the after-discovered evidence exception. ***Id.***

Commonwealth v. Liebensperger, 904 A.2d 40, 46-47 (Pa. Super. 2006). The ***Liebensperger*** Court distinguished ***Cruz*** on the basis that the appellant in ***Liebensperger***, while suffering from some mental conditions, did not have a physical brain injury and was able to cooperate in his own defense. ***Id.*** at 47.

Here, we have only Appellant's bald assertions that he suffers from mental illness and that the illness kept him from exercising due diligence. Appellant did not identify the mental illness from which he suffers, nor did he indicate how that illness kept him from learning of the 2003 article for almost ten years. Appellant has not pled that he has a brain injury, that he was unable to assist in his defense, or that he was not competent. As this is Appellant's third PCRA petition, it is clear that he has been actively pursuing his avenues of relief, which belies any claim of sustained incompetence. Thus, this case is sufficiently distinguishable from ***Cruz*** as to not require us to reach the same result.

Because Appellant has not adequately alleged facts to overcome the PCRA's time bar under section 9545(b)(1)(ii), Appellant has not properly invoked our jurisdiction under the PCRA. Therefore, we affirm the trial court's dismissal of Appellant's PCRA petition as untimely.

Order affirmed. Jurisdiction relinquished

Judgment Entered.

Prothonotary

Date: 6/5/2013