

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SHAHNAWAZ M. MATHIAS JR.,	:	
	:	
Appellant	:	No. 1289 MDA 2013

Appeal from the PCRA Order June 19, 2013  
In the Court of Common Pleas of York County  
Criminal Division No(s): CP-67-CR-0006753-2005

BEFORE: ALLEN, LAZARUS, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.:

**FILED DECEMBER 13, 2013**

Appellant, Shahnawaz M. Mathias, Jr., takes this counseled<sup>1</sup> appeal from the order entered in York County Court of Common Pleas, dismissing his Post Conviction Relief Act<sup>2</sup> (“PCRA”) petition as untimely filed. Appellant argues the petition was timely because: (1) his serial so-called direct appeals—which were all quashed for untimely notices of appeal—tolled the filing period for a PCRA petition; and (2) in the alternative, the PCRA court should have exercised equity and overlooked any untimeliness bar because he made a strong prima facie showing of innocence. We affirm.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> Appellant is represented by Shannon K. McDonald, Esq.

<sup>2</sup> 42 Pa.C.S. §§ 9541-9546.

This criminal case returns to the Superior Court for the sixth time.<sup>3</sup> On May 15, 2006, Appellant pleaded guilty to indecent assault and unlawful contact with a minor,<sup>4</sup> and on November 15, 2006, the trial court imposed an aggregate sentence of five years' probation.<sup>5</sup> Twelve days thereafter, Appellant filed a post-sentence motion seeking withdrawal of his "plea because he discovered that, as a condition of his probation," his travel and contact with his minor children were limited and he was not permitted to consume alcohol. **Mathias**, 1116 MDA 2007 at 2. The trial court denied this motion on January 18, 2007. Appellant then filed a counseled application on June 6, 2007 to modify his probation, challenging the probationary condition that he first obtain permission before travelling outside the York County area, and seeking instead merely to provide notice before traveling. The court denied this application on June 8, 2007.

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<sup>3</sup> **See Commonwealth v. Mathias**, 1128 MDA 2012 (judgment order) (Pa. Super. filed Apr. 8, 2013); **Commonwealth v. Mathias**, 1797 MDA 2011 (judgment order) (Pa. Super. filed Apr. 8, 2013); **Commonwealth v. Mathias**, 1301 MDA 2010 (unpublished memorandum) (Pa. Super. filed Aug. 2, 2011), *appeal denied*, 637 MAL 2011 (Pa. filed Apr. 9, 2012); **Commonwealth v. Mathias**, 1421 MDA 2009 (unpublished memorandum) (Pa. Super. filed Apr. 30, 2010); **Commonwealth v. Mathias**, 1116 MDA 2007 (unpublished memorandum) (Pa. Super. filed Aug. 4, 2008), *appeal denied*, 27 MAL 2009 (Pa. filed Jul. 1, 2009). In all of but the first of these appeals, Appellant was represented by Robert A. Berry, Esq. In the first appeal he was represented by Eugene R. Campbell, Esq.

<sup>4</sup> 18 Pa.C.S. §§ 3126, 6318.

<sup>5</sup> In his appellate brief, Appellant states that he "is still under supervision of the probation and parole department." Appellant's Brief at 6.

Appellant took appeals from both orders which were consolidated by this Court. The Commonwealth argued that Appellant's motion to modify the conditions of his "probation was akin to an untimely post-sentence motion, and therefore, [his] appeal from the . . . order, which denied the application, was also untimely." *Id.* at 5. On September 19, 2007, this Court issued an order quashing that appeal.

However, in an unpublished memorandum dated August 4, 2008, this Court declined to find Appellant's appeal from the latter order untimely. We reasoned that the court had jurisdiction under 42 Pa.C.S. § 9771(a) to consider Appellant's second application for relief, "which essentially sought to lessen a condition of [his] probation related to his traveling." *Id.* at 6. Nevertheless, this Court found Appellant's issue waived for counsel's untimely filing of a court-ordered Pa.R.A.P. 1925(b) statement. Our Supreme Court denied allowance of appeal from this decision on July 1, 2009. ***Commonwealth v. Mathias***, 27 MAL 2009 (Pa. Jul. 1, 2009).

One day after this Court issued our memorandum, on August 5, 2008, Appellant filed a counseled PCRA petition, alleging that he "recently . . . discovered that the [victim] has recounted to one or more persons her accusations by admitting that the alleged crime was a falsehood perpetuated to obtain a financial advantage." Appellant's Pet. for Relief Under Post Conviction Act, 8/5/08, at ¶ 9. The petition further averred, "That information was reduced to an affidavit signed by one Jason Hollar," which

he attached, and that Appellant was “attempting to ascertain the identity of at least two . . . other individuals to whom [the victim] has recanted[.]” *Id.* at ¶ 10. On August 13th, the trial court dismissed the petition without prejudice, reasoning that the appeal before this Court was still pending.<sup>6</sup> Order, 8/13/08.

We summarize that subsequently, Appellant filed numerous petitions with the trial court seeking relief from the terms of his probation. Some of the denials of these petitions resulted in appeals to this Court. This Court quashed two of the appeals, in each holding that the relief Appellant sought related to his judgment of sentence, and thus his notices of appeal were untimely. *Mathias*, 1301 MDA 2010 at 4-5; *Mathias*, 1421 MDA 2009 at 3-4. A third appeal related to the trial court’s denial of a motion to modify Appellant’s probation so that he could “exercise custodial rights to his children.” *Mathias*, 1797 MDA 2011 at 2. This Court held that Appellant’s motion for reconsideration of the denial of this motion was untimely and thus his notice of appeal was untimely. We therefore quashed. The last appeal stemmed from the court’s denial of a petition to terminate probation,

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<sup>6</sup> Although this Court had already issued our memorandum denying relief, the record remained in this Court’s possession. *See* Pa.R.A.P. 2572(a)(1). Indeed, after filing the PCRA petition, Appellant sought allowance of appeal from our decision with the Pennsylvania Supreme Court.

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which was filed while the third appeal was pending.<sup>7</sup> **Mathias**, 1128 MDA 2012. This Court quashed, holding that because the pending appeal “also concerned the terms of his probation,” “the trial court was without jurisdiction to rule on” the latest petition. **Id.**

On May 7, 2013, approximately one month after the last Superior Court decision, Appellant filed the instant, counseled PCRA petition.<sup>8</sup> On May 23rd, the PCRA court issued notice under Rule of Criminal Procedure 907 of its intent to dismiss the petition without a hearing. The court found that Appellant “did not file any appeal within thirty days of the date of the sentencing order,” and thus he “had one year from the date his sentence became final to file [a PCRA petition], i.e., he had to file by December 15, 2007, which he failed to do.” Trial Ct.’s Notice Pursuant to P. Rule of Crim. Pro. 907, 5/23/13, at 1-2.

Current counsel subsequently entered her appearance, and on June 5, 2013, filed an amended PCRA petition, raising various claims of trial counsel’s ineffectiveness and requesting a hearing or “new trial so that he may present evidence as to his alibi defense, . . . his passport showing that he was not in the country on the date of the alleged incident[.]” Appellant’s Amended Pet. for Post Conviction Relief, 6/5/13, at ¶¶ 24, 26. The petition

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<sup>7</sup> The third and fourth appeals were disposed by judgment orders, issued on the same date, April 8, 2013.

<sup>8</sup> Appellant’s attorney at this time was Eugene R. Campbell, Esq.

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also alleged “newly discovered exculpatory evidence” under PCRA subsection 9545(b)(1)(ii), “in the form of information received from an acquaintance, Jason Hollar, who is willing to testify that he was told by the alleged victim that she was trying to extort [Appellant] through these criminal charges.”

**Id.** at ¶¶ 62-63

On June 10, 2013, Appellant filed a counseled response to the PCRA court’s Rule 907 notice. On June 19th, the court dismissed Appellant’s petition as untimely filed, rejecting his claim that his information about Jason Hollar was recently discovered. Appellant filed a timely notice of appeal and complied with the court’s order to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

On appeal, Appellant’s counseled brief argues the PCRA “time bar should be excused for two reasons,” which we summarize *seriatim*. Appellant’s Brief at 6. First, while conceding that “[e]quitable tolling does not apply to PCRA issues such as this,” he nevertheless reasons that because he “has been alleging [a credible claim of innocence] for years,” “the equity of the court should acknowledge that claim and investigate it, despite timeliness issues.” **Id.** at 6, 8. Appellant also contends “there may be reasons why 60 days is not an adequate period for filing, but the individual in question is not [lackadaisical] about his case,” and that the instant matter is “[s]uch a situation,” where Appellant “hired counsel who

was ineffective, and he found further evidence of his innocence after he pled guilty.” **Id.** at 10.

Appellant’s second argument for why his PCRA petition was timely filed is that he “has been counseled for years, both by his attorneys and by the actions of the court itself, that his PCRA petition is not timely until he has no appeals pending.” **Id.** at 6. Appellant maintains that his “last appeal reached the end of direct review on April 8, 2013,” and thus “a PCRA petition is available until April 8, 2014 to challenge the order of his probation, and to challenge the legality of that order.” **Id.** at 7-8. We find no relief is due.

Preliminarily, we note that aside from a bald claim that all of his prior “probation appeals must be considered direct appeals,” Appellant fails to provide any analysis to support his conclusion that he had until April 8, 2013 to file a PCRA petition. **See id.** at 7. As in any PCRA appeal, we first calculate the date the judgment of sentence became final and the date the general one-year period for filing a PCRA petition expired.

“[T]he time limits imposed by the PCRA . . . implicate our jurisdiction to address [PCRA] claims.” **Commonwealth v. Marshall**, 947 A.2d 714, 719 (Pa. 2008). It is “well settled that there is no generalized equitable exception to the jurisdictional one-year time bar pertaining to post-conviction petitions.” **Commonwealth v. Brown**, 943 A.2d 264, 267 (Pa. 2008).

“To be timely, a PCRA petition must be filed within one year of the date that the petitioner’s judgment of sentence became final, unless the petition alleges and the petitioner proves one or more of the . . . statutory exceptions” under 42 Pa.C.S. § 9545(b)(1). **Marshall**, 947 A.2d at 719. “[A] judgment becomes 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.**” 42 Pa.C.S. § 9545(b)(3) (emphasis added). Our Supreme Court has held:

[I]n circumstances in which no timely direct appeal is filed relative to a judgment of sentence, and direct review is therefore unavailable, the one-year period allowed for the filing of a post-conviction petition commences upon the actual expiration of the time period allowed for seeking direct review, as specified in the PCRA.

**Brown**, 943 A.2d at 268.

The exception at subsection 9545(b)(1)(ii) provides that a petition may be filed beyond the general one-year deadline when “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[.]” 42 Pa.C.S. § 9545(b)(1)(ii).

We emphasize that it is the petitioner who bears the burden to allege and prove that one of the timeliness exceptions applies. In addition, a petition invoking any of the timeliness exceptions must be filed within 60 days of the date the claim first could have been presented. 42 Pa.C.S. § 9545(b)(2). A petitioner fails to satisfy the 60-day requirement of Section 9545(b) if he or she fails to



explain why, with the exercise of due diligence, the claim could not have been filed earlier.

**Marshall**, 947 A.2d at 719-20 (some citations omitted).

In the instant matter, Appellant was sentenced on November 15, 2006. Pursuant to section 9545(b)(3), his judgment of sentence became final at the conclusion of direct review **or at the expiration of time for seeking the review**. **See** 42 Pa.C.S. § 9545(b)(3). Appellant had ten days to file a timely post-sentence motion, which would have tolled the thirty-day period for filing an appeal. **See** Pa.R.Crim.P. 720(A)(1)-(2). As stated above, Appellant filed a post-sentence motion to withdraw his guilty plea on November 27, 2006; this motion was untimely. **See** Pa.R.Crim.P. 720(A)(1). Thus, the trial court lacked jurisdiction to hear it, and the thirty-day period for filing a notice of appeal ran from the date sentence was imposed, expiring on December 15, 2006. **See** Pa.R.A.P. 903(a); Pa.R.Crim.P. 720(A)(3). The trial court's subsequent denial of the post-sentence motion on January 18, 2007, did not toll the appeal period. **See** Pa.R.Crim.P. 720(A)(3). Appellant's appeal from that order was thus untimely, and **this Court quashed that appeal**. **Mathias**, 1116 MDA 2007 at 5.

In light of the foregoing, we hold that under section 9545(b)(3), Appellant's judgment of sentence became final on December 15, 2006, which was the expiration of time for seeking direct review. **See** 42 Pa.C.S. § 9545(b)(3); **Brown**, 943 A.2d at 268. The fact that Appellant filed an

untimely appeal, which was quashed by this Court, is not relevant. Furthermore, Appellant provides no authority supporting his premise that his prior “probation appeals must be considered direct appeals” that affected the time in which he had to file a PCRA petition. **See** Appellant’s Brief at 7. We reject such an interpretation. Under Appellant’s theory, a defendant can circumvent a PCRA filing-time bar by simply filing what he purports is a direct appeal from the judgment of sentence, even if those appeals are quashed by this Court for untimeliness.

Having determined that Appellant’s judgment of sentence became final on December 15, 2006, we calculate that he then had one year, until December 15, 2007, to file a PCRA petition. **See** 42 Pa.C.S. § 9545(b)(1). This is consistent with the trial court’s reasoning in its Rule 907 notice. The instant petition was filed more than five years later, on May 7, 2013. Accordingly, we review whether, as Appellant maintains, his PCRA petition properly pleaded the exception at subsection 9545(b)(1)(ii). **See** 42 Pa.C.S. § 9545(b)(1)(ii).

As stated above, Appellant’s latest PCRA petition raised various claims of ineffective assistance of trial counsel. None of these invoke any of the timeliness exceptions. With respect to Appellant’s claim of “newly discovered evidence,” Jason Hollar’s affidavit is clearly dated August 2, 2008. Thus, we agree with the PCRA court that the record “establishe[d] that Mr. Hollar was known to [Appellant] as a possible witness” as of that

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date. Order, 6/19/13. Appellant advanced no argument in his PCRA petition, nor in the instant appeal, that he filed a PCRA petition within sixty days of learning of Jason Hollar's information. **See** 42 Pa.C.S. § 9545(b)(1)(ii). We reject Appellant's argument that his first PCRA petition relying on this new evidence was dismissed because he had "direct appeals" pending. **See** Appellant's Brief at 6. While it is true that the PCRA court lacked jurisdiction to hear the petition was an appeal was pending,<sup>9</sup> the proper procedure was for Appellant to file another PCRA petition raising this claim within sixty days of the resolution of the appeal. Appellant failed to do so.

Finally, we reject Appellant's contention that the PCRA court could have exercised equity to overlook the untimeliness of petition. **See IBrown**, 943 A.2d at 267.

For the foregoing reasons, we affirm the order of the PCRA dismissing Appellant's petition on the ground that it was untimely filed.

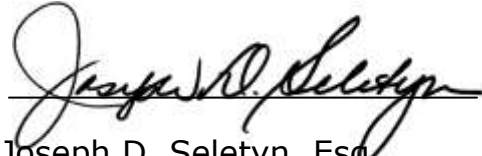
Order affirmed.

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<sup>9</sup> **See** Pa.R.A.P. 1701(a) (stating general rule that after appeal is taken, trial court may no longer proceed further in matter).

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Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/13/2013