

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
W.H.M., JR.,	:	
	:	
Appellant	:	No. 1390 WDA 2012

Appeal from the PCRA Order entered August 14, 2012, in the Court of Common Pleas of Lawrence County, Criminal Division, at No(s): CP-37-CR-0001019-2004.

BEFORE: SHOGAN, OTT, and STRASSBURGER\*, JJ.

MEMORANDUM BY STRASSBURGER, J.: FILED: May 2, 2013

W.H.M., Jr. (Appellant) appeals from the order entered August 14, 2012, dismissing as untimely his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After careful review, we affirm, albeit for reasons different than those of the PCRA court.<sup>1</sup>

The PCRA court summarized the relevant factual and legal history of this case as follows.

On May 19, 2005, [Appellant] was convicted of [r]ape, [s]tatutory [s]exual [a]ssault, [i]ncest, [a]ggravated [i]ndecent [a]ssault, and [c]orruption of [m]inors. On June 9, 2006, [Appellant] was sentenced by [the court] to serve an aggregate term of incarceration of not less than 8 and ½ years nor more than 17 years, plus five years of state probation to run

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<sup>1</sup> “[W]e may affirm the decision of the [PCRA] court if there is any basis on the record to support the [PCRA] court's action; this is so even if we rely on a different basis in our decision to affirm.” **Commonwealth v. Wiley**, 966 A.2d 1153, 1157 (Pa. Super. 2009) (citing **Commonwealth v. Blackwell**, 936 A.2d 497, 499 (Pa. Super. 2007)).

\* Retired Senior Judge assigned to the Superior Court.

consecutively. [Appellant] filed a post-sentence motion, which was denied on October 13, 2006 and, after appeal, affirmed by the Superior Court on August 22, 2007. [**See Commonwealth v. W.H.M., Jr.**, 932 A.2d 155 (Pa. Super. 2007).]

[Appellant's] first PCRA petition was timely filed on January 2, 2008. [The PCRA court] denied that petition on January 11, 2010. On January 26, 2010, a timely appeal of the [PCRA court's] decision was filed to the Superior Court, and the Superior Court affirmed that decision on October 5, 2010. [**See Commonwealth v. W.H.M.**, 15 A.3d 517 (Pa. Super. 2010) (table).] On or about May 6, 2011, [Appellant] filed a second *pro se* PCRA petition. On September 21, 2011, [the PCRA court] provided Notice to [Appellant] pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure of intent to dismiss [Appellant's petition] as being untimely and without merit.

[Appellant] filed a Motion for Appointment of Counsel on September 28, 2011. Attorney Robert T. Barletta was assigned by the [PCRA court] as counsel for [Appellant]. On April 2, 2012, [Appellant] filed the instant Amended Second Pro Se PCRA petition. On or about April 16, 2012, Attorney Barletta filed a Motion to Withdraw and a letter memorandum consistent with the requirements of **Commonwealth v. Turner**, 518 Pa. 491, 544 A.2d 927 (1988) and **Commonwealth v. Finley**, 379 Pa.Super. 390, 550 A.2d 213 (1988) [(*en banc*)], citing that [Appellant's] instant PCRA [petition] is untimely and lacks merit. [The PCRA court] granted Attorney Barletta his Motion for Withdrawal, and provided [Appellant] time to file a Brief, *pro se*, to address the issue of timeliness of his May 6, 2011 PCRA Petition.

PCRA Court Opinion, 8/14/2012, at 1-3.

Finding that Appellant did not meet the timeliness requirements or any exceptions thereto of the PCRA, the PCRA court denied Appellant relief. **Id.** at 6. Appellant *pro se* filed a timely notice of appeal. The PCRA court ordered Appellant to file a concise statement pursuant to Pa.R.A.P. 1925, and Appellant complied.

On appeal, Appellant sets forth three issues for our review.

I) Did the PCRA Court error [*sic*] in determining that the Appellant's Second PCRA Petition was untimely, that the issues raised had been previously litigated or waived and the Layered Claim of Ineffective Assistance of Counsel did not meet the exceptions provided for in 42 Pa.C.S.A. § 9545(b)?

II) Did the PCRA Court error [*sic*] by not addressing the Appellant's claim of abandonment of counsel?

III) Did the PCRA Court error [*sic*] in [*its*] determination denying the Appellant's current PCRA Petition?

Appellant's Brief at 5.<sup>2</sup>

The timeliness of a post-conviction petition is jurisdictional. ***Commonwealth v. Robinson***, 12 A.3d 477, 479 (Pa. Super. 2011). Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence is final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition is met. 42 Pa.C.S. § 9545. The exceptions to the timeliness requirement are:

(i) the failure to raise the claim previously was the result of interference of 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

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<sup>2</sup> The Commonwealth filed a letter with this Court declining to file a responsive brief, and relying on the opinion of the PCRA court. Letter to Superior Court Prothonotary, 3/1/2013.

this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1). A PCRA petition invoking one of these statutory exceptions must “be filed within 60 days of the date the claims could have been presented.” **Robinson**, 12 A.3d at 480.

Appellant’s PCRA petition was filed on May 6, 2011, over three years after his judgment of sentence became final in September 2007. Therefore, Appellant had the burden of pleading and proving a timeliness exception. The PCRA court determined that Appellant failed to do so. PCRA Court Order, 8/14/2012, at 4-6.

In Appellant’s *pro se* PCRA petition, he does not assert specifically any timeliness exception, but he does make one statement with regard to abandonment of prior PCRA counsel. Specifically, he states that “I have not been notified of the denial of my PCRA that was filed on January 2, 2008, by my appointed counsel Stanley T. Booker.” PCRA Petition, 5/6/2011, at 4. In his response to the PCRA court’s Rule 907 Notice, Appellant asserts the following:

The Superior Court Western Dist. affirmed [the PCRA court’s] decision on October 5, 2010, for which [Appellant] was never notified of by his appointed counsel. [Appellant] had even written counsel on November 29, 2010 asking about when a decision may be reached. [Appellant’s] mother had a telephone conversation with counsel on October 4, 2010, where counsel expressed that a decision should be made around Christmas.

[Appellant] on his own accord, requested a Docket Statement from the Superior Court Western Dist. and received said docket on January 4, 2011. [Appellant] was more than surprised to find that the Superior Court Western Dist. had

affirmed this court's decision on October 5, 2010 and [Appellant] had NOT been notified of this by appointed counsel.

Response to Rule 907 Notice, 12/7/2011, at 4.

In his *pro se* amended PCRA petition, Appellant again asserts that counsel abandoned him and avers that he sent a letter to counsel dated November 29, 2010, where he specifically requested that PCRA counsel file a petition for allowance of appeal to the Pennsylvania Supreme Court if his PCRA petition is denied. Amended PCRA Petition, 4/2/2012, at 5.

Nonetheless, in appointed counsel's **Turner/Finley** no merit letter, he states that "no valid time bar exceptions were raised by [Appellant] in his second PCCR Petition or his second Amended PCRA Petition, and a review of the record by counsel affirms the absence of any facts or evidence which would support application of the PCRA's time bar exceptions." **Turner/Finley** Letter, 4/16/2012, at 5. Agreeing with this assessment, the PCRA court denied relief. Such conclusion was in error, but for the reasons set forth below, Appellant is still not entitled to relief.

In [**Commonwealth v. Bennett**, 930 A.2d 1264 (Pa. 2007)], our Supreme Court found that attorney abandonment may constitute a factual basis for the section 9545(b)(1)(ii) timeliness exception. In that case, the appeal from the dismissal of Bennett's first, timely, PCRA petition was dismissed by this Court because counsel failed to file a brief. Bennett filed a second PCRA petition alleging that he had attempted to find out the status of his PCRA appeal, did not learn that it was dismissed due to counsel's failure to file a brief until he received a letter from this Court explaining what had transpired, and filed a new PCRA petition within 60 days of so learning. The PCRA court granted Bennett leave to appeal the dismissal of his first PCRA petition *nunc pro tunc*, but this Court quashed the appeal as untimely. Our Supreme Court reversed this Court, holding that

Bennett sufficiently alleged that he had been abandoned by counsel on his first PCRA petition and acted with due diligence in ascertaining the fact of the abandonment to satisfy the timeliness exception of the PCRA found at section 9545(b)(1)(ii).

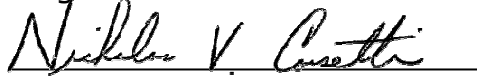
***Commonwealth v. Huddleston***, 55 A.3d 1217, 1220 (Pa. Super. 2012).

Thus, pursuant to ***Bennett, supra***, Appellant has asserted a fact that supports the newly discovered fact timeliness exception to the PCRA pursuant to 42 Pa.C.S. § 9545(b)(1)(ii). Specifically, Appellant discovered that counsel abandoned him by failing to notify him of the this Court's determination in his first PCRA petition. However, Appellant had only 60 days from the time he discovered this fact in order to file a new petition.

Here, Appellant avers that he found out about this Court's denial of his first PCRA petition at his own request in January 2011. The petition at issue was not filed until May 2011, outside the 60 day window. Thus, the petition was too late to qualify for the newly discovered facts timeliness exception; therefore, the PCRA court did not err in denying the petition.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/2/2013