NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TONY CURTIS YOHE, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1457 MDA 2012

Appeal from the PCRA Order August 6, 2012
In the Court of Common Pleas of Union County
Criminal Division at No(s): CP-60-CR-0000029-2002

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY STEVENS, P.J. **FILED MAY 06, 2013**

Tony C. Yohe (hereinafter "Appellant") appeals from the Order entered in the Court of Common Pleas of Union County on August 6, 2012, denying his third petition filed pursuant to the Post Conviction Relief Act (PCRA).[1] Counsel for Appellant also has filed a Petition for Permission to Withdraw as Counsel under ***Anders v California***, 386 U.S. 738 (1967) and ***Commonwealth v. McClendon***, 434 A.2d 1185. Upon our review of the record, we grant counsel's petition to withdraw and affirm the trial court's Order.

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[1] 42 Pa.C.S.A. §§ 9541-9546.

This matter arises out of an incident which occurred on August 31, 2001, at which time Appellant and his co-defendants broke into the home of a married couple, confronted them in their bed, robbed them at gunpoint and bound them with duct tape before absconding. This Court set forth the facts and procedural history herein in a prior memorandum decision affirming Appellant's judgment of sentence as follows:

> Appellant [ ] appeals the judgment of sentence entered on December 23, 2002, in the Union County Court of Common Pleas. Appellant was convicted of one count of criminal conspiracy to commit robbery,[1] one count of criminal solicitation to commit robbery,[2] two counts of robbery,[3] one count of burglary,[4] one count of theft,[5] two counts of unlawful restraint,[6] two counts of making terroristic threats,[7] and two counts of simple assault[8] by jury verdict on September 25, 2002. Upon review, we affirm.
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> Appellant made a signed confession on December 14, 2001, and was subsequently convicted of the above named offenses by jury verdict on September 25, 2002, following a joint trial with a co-defendant, Jay Michael Boyer. On December 23, 2002, Appellant was sentenced to an aggregate sentence of 384 months to 1,200 months imprisonment. Appellant filed post-sentence motions on December 20, 2002, and the trial court partially denied them on April 1, 2003. Appellant timely appealed the judgment of sentence on May 1, 2003. . . . .
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> [1] 18 Pa.C.S.A. § 903(a)(1).
> [2] 18 Pa.C.S.A. § 902(a).
> [3] 18 Pa.C.S.A. § 3701(a)(1)(ii).
> [4] 18 Pa.C.S.A. § 3502(a).
> [5] 18 Pa.C.S.A. § 3921(a).
> [6] 18 Pa.C.S.A. § 2902(1).
> [7] 18 Pa.C.S.A. § 2706(a)(1).
> [8] 18 Pa.C.S.A. § 2701(a)(3).

Commonwealth v. Yohe, No. 690 MDA 2003, filed March 18, 2004 at 1-2 (unpublished memorandum). On October 20, 2004, our Supreme Court

denied Appellant's petition for allowance of appeal. ***Commonwealth v. Yohe***, 580 Pa. 713, 862 A.2d 1255 (2004).

On March 24, 2005, Appellant filed his first, counseled PCRA petition. Thereafter, new counsel was appointed and filed two amended petitions. Appellant's second amended petition was denied following a hearing, and on appeal to this Court, Appellant asserted trial counsel had been ineffective at sentencing for not strenuously arguing for concurrent sentences. In a memorandum decision filed on July 12, 2006, this Court affirmed the PCRA court and determined Appellant's sentencing challenge did not present a substantial question. ***Commonwealth v. Yohe***, 907 A.2d 1141 (Pa. Super. 2006). Specifically, this Court noted that though in ***Commonwealth v. Dodge***, 859 A.2d 771 (Pa. Super. 2004), *appeal denied*, 584 Pa. 672, 880 A.2d 1236 (2005), we had found that the imposition of consecutive range sentence may raise a substantial question where the sentence is so manifestly excessive as to constitute a punishment that is too severe, in making that finding we distinguished the decision of ***Commonwealth v. Boyer***, 856 A.2d 149 (Pa. Super. 2004), which had rejected the appeal of Appellant's co-defendant who had challenged his twenty-six to one hundred year sentence as manifestly excessive. In doing so, we stressed that the record in ***Boyer*** reflected violence against persons and criminal activity not present in ***Dodge*** and reasoned that "as this case stems from the same facts and involves the same convictions as in ***Boyer***, ***Dodge*** is likewise

'markedly different' from [A]ppellant's case.'" ***Commonwealth v. Yohe***, 248 MDA 2006, unpublished memorandum at 4 n. 1. (Pa. Super. filed July 12, 2006).

On June 20, 2008, Appellant filed a second PCRA petition *pro se* wherein he raised various claims of ineffective assistance of prior counsel for failing to object to an illegal sentence. In an Order entered on December 3, 2009, the PCRA court vacated the sentences of eighteen to sixty months for counts 7-10 (terroristic threats and unlawful restraint) after finding that the sentence was illegal under the doctrine of merger. Appellant's aggregate sentence was thereby reduced to 312 months (twenty-six years) to 960 months (eighty years). The PCRA court further noted that "[b]y stipulation of counsel at hearing, [Appellant's] claims of failure of counsel to raise on appeal the issue of a 'corrupt source instruction' (Petition Paragraph 27[c]) and failure of counsel to consult with [Appellant] concerning an appeal to the Pennsylvania Supreme Court (Petition Paragraph 27[d]) are withdrawn." See Order filed 12/3/09, at ¶2. Appellant did not appeal the December 3, 2009, Order.

On April 9, 2010, Appellant filed his third PCRA petition *pro se*. Therein, he argued his then PCRA counsel had been ineffective for failing to file an appeal following the December 3, 2009, Order and that his statements to police prior to trial should have been suppressed in light of the fact his co-defendant had received a favorable decision in his PCRA appeal to

this Court.[2] New counsel was appointed and filed an Amended Petition wherein he requested an evidentiary hearing and made the following claims:

> 10. Trial counsel was ineffective for failing to raise the issue regarding suppression of codefendant's statement for a violation of Miranda Rights.
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> 11. Appellate counsel, as well as each PCRA counsel, rendered ineffective assistance of counsel for failure to preserve and raise the issue of codefendant's statement on direct appeal and the initial PCRA petition.
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> 12. This is [Appellant's] first opportunity to raise these claims as PCRA counsel did not file an appeal to the Superior Court from the partial denial of the PCRA petition and the Superior Court decision in ***Commonwealth v. Boyer***, 523 MDA 2008, was decided December 10, 2008,
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> 13. [Appellant] avers that if the issue raised by codefendant Boyer had been raised on direct appeal, there was a reasonable probability that he would have prevailed on appeal.
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> 14. The prejudicial ineffectiveness of trial counsel, appellate counsel, and PCRA counsel so undermined the truth

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[2] Specifically, in a decision filed on December 10, 2008, a panel of this Court determined defense counsel's failure to file a motion seeking to suppress Appellant's co-defendant's confession to a police officer which had been obtained in violation of his right to counsel prejudiced co-defendant as an element of ineffective assistance. ***Commonwealth v. Boyer***, 962 A.2d 1213, 1218-1219 (Pa. Super. 2008). Importantly, we stressed that:

> our ruling today is not to be taken as a pronouncement that there necessarily was a ***Miranda[v. Arizona***, 384 U.S. 432, 86 S.Ct. 1602, 16 L.Ed.2d, 694 (1966)] violation and that the confession must necessarily be suppressed pursuant to ***Miranda***. We do, however, find [a]ppellant has convinced us that there is arguable merit to a ***Miranda*** claim based on the testimony as it now stands and that counsel was ineffective. Appellant is free to seek suppression of his confession pursuant to ***Miranda*** on remand.

Boyer, ***supra***, at 1219. In his Amended Petition for Post-Conviction Collateral Relief filed on September 7, 2011, Appellant indicates that on retrial, co-defendant Boyer negotiated a guilty plea and a sentence of five to fifteen years in prison. ***See*** Amended Petition for Post-Conviction Collateral relief filed 9/7/11 at ¶ 9.

> determining process that no reliable adjudication of guilt or innocence could have taken place.

See Amended Petition for Post-Conviction Collateral Relief at ¶¶ 10-14.

A PCRA hearing was held on March 29, 2012, and in June of 2012.[3] At the initial hearing, the PCRA court notified Appellant at the outset it did not believe it had jurisdiction over the Amended PCRA at that time, though it would hear his testimony. N.T. 3/29/12 at 3. Appellant testified that he had asked his PCRA counsel in writing to appeal the December 2009 Order "based on the Boyer confession issue that came up." N.T., 3/29/12 at 6. Appellant stated that he had become aware that Mr. Boyer's sentence was "overturned" in February of 2009. Though he said he had no proof of this Court's decision at that time, he explained he had notified his then PCRA counsel about it prior to the June hearing on his second PCRA petition. ***Id***. at 7. Appellant explained his understanding of the agreement PCRA counsel had reached with the Commonwealth at that time as follows: "we weren't

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[3] The trial court and Appellant indicate that a second hearing was held in June of, 2012, at which time current PCRA counsel conceded that Appellant never requested that an appeal be taken from the December 3, 2009, Order. There is no transcript of such hearing in the certified record, and the efforts of the Prothonotary to obtain one from the trial court revealed that though a June hearing was scheduled, there is nothing to indicate that one was actually held. Therefore, we are unable to review the statements, if any, made at a June 2012 PCRA hearing. "It is the responsibility of an appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty." ***Commonwealth v. Griffin***, 2013 WL 1313089, at *2 (Pa. Super. filed April 2, 2013) (citation omitted).

going to argue the timeliness issue of the PCRA anymore; that I was just going to be resentenced on the charges that were supposed to be ran [sic] concurrent with other charges." ***Id***. at 11. Appellant acknowledged the first time the Boyer issue was raised was when he filed his third PCRA petition *pro se*. ***Id***. at 12.

Appellant was questioned on cross-examination regarding a letter dated March 29, 2010, which he had attached to the PCRA petition filed on April 9, 2010, and the petition itself. Appellant admitted that at the time he wrote and signed the third petition, he had believed Mr. Boyer's confession was actually suppressed. ***Id***. at 13-16. He testified at this time that he did not receive this Court's decision in ***Commonwealth v. Boyer, supra***, until April or May of 2010. Yet, counsel for the Commonwealth asked Appellant to review documents from his own file, one of which was the ***Boyer*** decision which bore a Westlaw rather than an Atlantic Reporter citation. ***Id***. at 19. Appellant acknowledged that the Westlaw citation indicates he accessed the case from a computer with the Westlaw cite from an "inmate paralegal." ***Id***. He also acknowledged receiving a copy of the Pennsylvania Law Weekly dated Monday, December 22, 2008, which was the first document to alert him of this Court's ruling in ***Boyer***. Appellant claimed he received these documents in January, February or March of 2010. ***Id***. at 22-24. Nevertheless, he admitted that in June of 2009, when he was at his prior PCRA hearing, he had already obtained knowledge of this Court's ruling in

Mr. Boyer's case in February of 2009. ***Id***. at 26. Appellant stated there was "no reason" he did not attempt to find the case in February 2009, other than his ignorance of the law. ***Id***. at 27. He acknowledged he had the ability to use the law library to find the ***Boyer*** case in February of 2009. ***Id***. at 28.

He also testified he wished to appeal his resentencing in December of 2009, not because he wanted to appeal the agreement into which he had entered but because he "wanted to appeal that the other sentences were excessive." ***Id***. at 30-31. He also wished to appeal as he believed Mr. Boyer's statement was the basis for his prosecution. ***Id***. at 32. He claimed that within thirty days of February of 2009, he notified his then PCRA counsel that he wanted to raise the ***Boyer*** issue as newly discovered evidence in a PCRA petition. ***Id***. at 33. Appellant admitted he obviously knew that PCRA counsel had not amended his petition with this issue prior to the agreement made on June 23, 2009, or before the December 2009 resentencing. ***Id***. at 34. Appellant became aware in the summer of 2010 that Mr. Boyer did not have a suppression hearing, but rather had entered into a plea deal instead. ***Id***. at 36-37. Appellant admitted that his third PCRA petition did not include a claim that Mr. Boyer's confession was, in fact, suppressed or specifically aver it constituted newly discovered evidence. ***Id***. at 44.

The PCRA court denied Appellant's third PCRA petition in its Order entered on August 6, 2012. Appellant filed a timely notice of appeal on

August 13, 2012, and a concise statement of errors complained of on appeal on September 13, 2012, wherein he raised issues of ineffectiveness of all prior trial and appellate counsel.

Before we consider counsel's petition to withdraw or the merits of Appellant's petition that is before us, we are compelled to discuss the affect the PCRA court's resentencing on December 3, 2009, had upon the procedural posture of the pending petition, if any. Appellant properly exercised his direct appeal rights and his first and second PCRA petitions were unquestionably PCRA petitions. Moreover, the relief granted to Appellant as a result of his second PRCA petition was post-conviction relief *per se*, and it did not affect the adjudication of guilt, but rather merely the sentence imposed. In this regard, a panel of this Court has held that "[b]ecause the purpose of the PCRA is to prevent a fundamentally unfair conviction, ***Commonwealth v. Carbone***, 707 A.2d 1145, 1148 (Pa. Super. 1998), and the issue of appellant's conviction was not disturbed on the prior PCRA action, we find that this petition constitutes appellant's second attempt at collateral relief." ***Commonwealth v. Dehart***, 730 A.2d 991, 994 (Pa. Super. 1999), *appeal denied*, 745 A.2d 1218 (Pa. 1999); ***See also Commonwealth v. McKeever***, 947 A.2d 782, 785-786 (Pa. Super. 2008) (reiterating the holding in ***Dehart***, that "a successful first PCRA petition does not "reset the clock" for the calculation of the finality of the judgment of sentence for purposes of the PCRA where the relief granted in the first

petition neither restored a petitioner's direct appeal rights nor disturbed his conviction, but, rather, affected his sentence only. We reached this conclusion because the purpose of the PCRA is to prevent an unfair conviction. ***Id.,*** 730 A.2d at 994 n. 2.”). As such, Appellant’s pending PCRA petition is properly considered to be his third.

As has been set forth above, current PCRA counsel has filed his Petition for Leave to Withdraw as counsel with this Court. Our Pennsylvania Supreme Court has set forth the procedure counsel must follow before such a petition is granted:

> [i]ndependent review of the record by competent counsel is required before withdrawal is permitted. ***Turner,*** at 928 (citing ***Pennsylvania v. Finley,*** 481 U.S. 551, 558, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)). Such independent review requires proof of:
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> 1) A “no-merit” letter by PC[R]A counsel detailing the nature and extent of his review;
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> 2) The “no-merit” letter by PC[R]A counsel listing each issue the petitioner wished to have reviewed;
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> 3) The PC[R]A counsel's “explanation”, in the “no-merit” letter, of why the petitioner's issues were meritless;
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> 4) The PC[R]A court conducting its own independent review of the record; and
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> 5) The PC[R]A court agreeing with counsel that the petition was meritless.

Commonwealth v. Pitts, 981 A.2d 875, 876 n. 1 (Pa. 2009) (quoting ***Finley,*** 550 A.2d at 215).

In ***Commonwealth v. Friend***, 896 A.2d 607 (Pa. Super. 2006), this Court imposed an additional requirement for counsel seeking to withdraw in collateral proceedings that:

> "***PCRA counsel who seeks to withdraw must contemporaneously serve a copy on the petitioner of counsel's application to withdraw as counsel, and must supply to the petitioner both a copy of the "no-merit" letter and a statement advising the petitioner that, in the event that the court grants the application of counsel to withdraw, he or she has the right to proceed*** **pro se** ***or with the assistance of privately retained counsel."***

Id. at 614 (emphasis in original).

Herein, upon our review of counsel's petition to withdraw and the appellate brief he has submitted on Appellant's behalf, we conclude that counsel has substantially complied with the procedural requirements of ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*) as restated in ***Pitts***. Counsel apparently mistakenly believed that an appeal from the denial of PCRA relief required the filing of an ***Anders*** brief; however, the appropriate filing is a no merit letter which follows the procedural requirements of ***Turner*** and ***Finley***. Notwithstanding, "because an ***Anders*** brief provides greater protection to a defendant, this Court may accept an ***Anders*** brief in lieu of a ***Turner/ Finley*** letter." ***Commonwealth v. Fusselman***, 866 A.2d 1109, 1111 n.3 (Pa. Super. 2004), *appeal denied*, 822 A.2d 477 (Pa. 2005).

Initially, counsel did not attach a letter informing Appellant of his right to proceed pro se or to proceed with a private attorney pursuant to ***Friend***;

Commonwealth v. Widgins, 29 A.3d 816, 818 (Pa. Super. 2011 (applying ***Friend***). As a result, this Court issued a Rule to Show Cause Order on November 30, 2012, directing counsel to notify Appellant with a proper statement advising Appellant as is required by ***Friend*** and to file a copy of the notification with this Court within ten days of the Order. As is reflected on the lower court docket, counsel attempted to comply with this Order and sent Appellant a letter dated December 10, 2012, properly notifying him as required by ***Friend***. This correspondence was received in the lower court on December 10, 2012, despite the Order's instruction to file a copy with this Court. On February 20, 2013, this Court received a copy of the notification letter. Appellant has not filed a response to counsel's petition to withdraw. Thus, we conclude that counsel has complied with the requirements necessary to withdraw as counsel. ***See Commonwealth v. Karanicolas,*** 836 A.2d 940, 947 (Pa. Super. 2003) (concluding that substantial compliance is sufficient to meet the ***Turner/Finley*** criteria). As such, we now turn to an independent review of Appellant's PCRA Petition to ascertain whether his claims entitle him to relief. ***Commonwealth v. Widgins***, 29 A.3d 816, 819 (Pa. Super. 2011).

Our standard of review of a denial of post-conviction relief is reviewed under the following, well-settled standard:

> "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,*** –––Pa. ––––, 36 A.3d 121,

> 131 (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. Spotz,*** 610 Pa. 17, 18 A.3d 244, 259 (2011) (citation omitted). "However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

Commonwealth v. Johnson, 51 A.3d 237, 242 -243 (Pa. Super. 2012). In addition, our Supreme Court recently reiterated the PCRA timeliness requirements as follows.

> Appellant's petition was filed after the effective date of the 1995 amendments to the PCRA; therefore, the jurisdictional time limits established by those amendments govern this case.[4] ***Commonwealth v. Fahy,*** 558 Pa. 313, 737 A.2d 214, 217–18 (1999). A PCRA petition, including a second or subsequent one, must be filed within one year of the date the petitioner's judgment of sentence became final, unless he pleads and proves one of the three exceptions outlined in 42 Pa.C.S. § 9545(b)(1).FN2 ***Commonwealth v. Howard,*** 567 Pa. 481, 788 A.2d 351, 354 (2002). A judgment becomes final at the conclusion of direct review by this Court or the United States Supreme Court, or at the expiration of the time for seeking such review. 42 Pa.C.S. § 9545(b)(3); ***Howard,*** at 353. The PCRA's timeliness requirements are jurisdictional; therefore, a court may not address the merits of the issues raised if the petition was not timely filed. ***Commonwealth v. Abu–Jamal,*** 574 Pa. 724, 833 A.2d 719, 723–24 (2003); ***Commonwealth v. Murray,*** 562 Pa. 1, 753 A.2d 201, 203 (2000). The timeliness requirements apply to all PCRA petitions, regardless of the nature of the individual claims raised therein. ***Murray,*** at 203. The PCRA squarely places upon the petitioner the burden of proving an untimely petition fits within one of the three

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[4] The third PCRA petition of Appellant herein likewise was filed after the effective date of the 1995 amendments.

> exceptions. ***See Commonwealth v. Bronshtein,*** 561 Pa. 611, 752 A.2d 868, 871 (2002) ("[I]t is the petitioner's burden to plead and prove that one of the exceptions applies [.]"). The PCRA further requires a petition invoking one of these exceptions to "be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2). On appeal from the denial of PCRA relief, this Court decides "whether the findings of the PCRA court are supported by the record and free of legal error." ***Abu–Jamal,*** at 723.
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> FN2. These exceptions are: "(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." 42 Pa.C.S. § 9545(b)(1)(i)-(iii).

Commonwealth v. Jones, 54 A.3d 14, 16 -18 (Pa. 2012). Also,

> "It is well-established that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." ***Koehler, supra, citing Strickland v. Washington,*** 466 U.S. 668, 687–691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In adopting ***Strickland,*** our Supreme Court articulated a three-part test to determine whether an appellant has received ineffective assistance of counsel. "Appellant must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission." ***Koehler, supra citing Commonwealth v. Pierce,*** 515 Pa. 153, 527 A.2d 973, 975 (1987).

Johnson, 51 A.3d at 243. Finally, our Supreme Court has held that:

> [i]t is well settled that allegations of ineffective assistance of counsel will not overcome the jurisdictional timeliness

> requirements of the PCRA. ***See Commonwealth v. Pursell,*** 561 Pa. 214, 749 A.2d 911, 915-16 (2000) (holding a petitioner's claim in a second PCRA petition, that all prior counsel rendered ineffective assistance, did not invoke timeliness exception, as "government officials" did not include defense counsel); ***see also Commonwealth v. Gamboa-Taylor,*** 562 Pa. 70, 753 A.2d 780, 785-86 (2000) (finding that the "fact" that current counsel discovered prior PCRA counsel failed to develop issue of trial counsel's ineffectiveness was not after-discovered evidence exception to time-bar); ***Commonwealth v. Lark,*** 560 Pa. 487, 746 A.2d 585, 589 (2000) (holding that allegation of ineffectiveness is not sufficient justification to overcome otherwise untimely PCRA claims).

Commonwealth v. Wharton, 886 A.2d 1120, 1127 (Pa. 2005).

In the case before us, the trial court imposed Appellant's sentence on December 23, 2002. This Court affirmed the judgment of sentence on March 18, 2004. On October 20, 2004, our Supreme Court denied Appellant's petition for allowance of appeal. Appellant did not seek further review. Accordingly, Appellant's judgment of sentence became final for PCRA purposes on or about January 19, 2005, upon expiration of the time to seek *certiorari* with the United States Supreme Court. ***See*** U.S.Sup.Ct.R. 13 (allowing ninety days to file petition for *certiorari*). Appellant filed his current PCRA petition on September 7, 2011, over six years later. Thus, his current petition is patently untimely and § 9545 clearly dictates the PCRA court had no jurisdiction to entertain the instant petition unless appellant pled and proved one of the three statutory exceptions thereto. 42 Pa.C.S. § 9545(b); ***Commonwealth v. Jones***, 54 A.3d 14, 16 -18 (Pa. 2012).

Our review of the record reveals Appellant has not properly asserted an exception to the PCRA's timeliness requirements. In his ***Anders*** brief, Appellant first asserts the PCRA court erred in failing to find that all prior counsel had been ineffective for failing to suppress Mr. Boyer's confession which led to Appellant's arrest and confession. Appellant asserts Mr. Boyer's confession constitutes facts that were unknown to him and could not have been ascertained by due diligence in that this Court[5] issued a decision in ***Boyer*** in December of 2008, wherein we discussed for the first time the possible ***Miranda*** violation and his first opportunity to raise this claim was in his third PCRA petition because his PCRA counsel had failed to file an appeal from the partial denial of his previous petition. Anders Brief at 14. This claim fails for several reasons.

The excerpts from the PCRA hearing quoted above indicate Appellant admitted to having knowledge of questions surrounding Mr. Boyer's confession in the early part of 2009. In addition, as the trial court notes:

> This argument falls short because all the facts surrounding Boyer's confession were contained in the police report provided to [Appellant] during the discovery phase of his original criminal case back in 2002. Additionally, the facts were of record during the joint trial of [Appellant] and his two codefendants- Jay Boyer and George MacDougall. Even giving the most liberal interpretation of timing possible, if one says that [Appellant] only became aware of the suppression issue at the time of the Superior Court opinion in the *Boyer* case, there are two problems. First, a pronouncement by an appellate court

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[5] Appellant erroneously asserts the Supreme Court issued the decision.

> interpreting a point of law is not "newly discovered evidence."[6] Second, using the date of the filing of the Superior Court decision as the start date, [Appellant] had to file his PCRA Petition within 60 days of the Superior Court ruling on December 10, 2008. Instead [Appellant's] Petition was filed on April 9, 2010. Thus, by either interpretation this Court has no jurisdiction over [Appellant's] present PCRA petition.[7]

We agree and find Appellant's first claim is clearly untimely. ***See Johnson*** and ***Wharton***, ***supra***.[8]

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[6] As we stated above, in ***Boyer***, this Court stressed that it was not deciding whether, in fact, a ***Miranda*** violation had occurred, and Mr. Boyer's entering into a plea deal resulted in no determination in that regard.

[7] This time calculation is incorrect. Appellant's second PCRA petition was pending from June 20, 2008 to January 3, 2010, which includes the thirty day time in which he had to file an appeal from the December 3, 2009, Order. Thus, the sixty-day time period began on January 3, 2010, and expired on March 4, 2010. Appellant did not file his third Petition until April 19, 2010, and for the reasons stated, *supra*, it was untimely. ***See Commonwealth v. Lark***, 746 A.2d 585, 588 (Pa. 2000) (footnote omitted) (holding "that when an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review. If the subsequent petition is not filed within one year of the date when the judgment became final, then the petitioner must plead and prove that one of the three exceptions to the time bar under 42 Pa.C.S. § 9545(b)(1) applies. The subsequent petition must also be filed within sixty days of the date of the order which finally resolves the previous PCRA petition, because this is the first "date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2)).

[8] Despite this finding, the PCRA court analyzed this claim on the merits, and determined Appellant was not entitled to relief thereon. Opinion, filed 7/6/12 at 9. "As we have determined the PCRA court lacked jurisdiction over appellant's petition due to his failure to file it within the 60–day time limit, we need not address the PCRA court's determination that the petition lacked merit or appellant's arguments based on that finding." ***Commonwealth v. Jones***, 54 A.3d 14, 18 n. 3 (Pa. 2012). We, as an appellate court, are empowered to "affirm [the PCRA court's] decision on any ground without

(Footnote Continued Next Page)

Appellant next asserts previous PCRA counsel had been ineffective for failing to file an appeal of the December 3, 2009, Order as per his request. Once again, this claim fails for several reasons.

First, Appellant acknowledged at the PCRA hearing he was aware he had thirty days in which to file an appeal. As such, even if he had informed counsel he wanted to appeal, and counsel failed to do so, Appellant did not file an appeal *pro se*, nor did he file his petition raising this claim until over ninety-days after a timely appeal would have to be filed. Also, as we detailed above, in our July 12, 2006, memorandum decision, this Court found Appellant's discretionary aspects of sentencing claim trial counsel had been ineffective for failing to argue strenuously for concurrent sentences lacked merit. At the March 29, 2012, hearing Appellant specified he did not wish to appeal the agreement into which he had entered in December of 2009, but rather only continued to challenge his sentence on the other charges. As such, this issue has been previously litigated. Also, counsel for Appellant admitted in his ***Anders*** brief that he conceded this argument at the time of the PCRA hearing. Finally, notwithstanding all of the above,

(Footnote Continued) ———————————

regard to the ground relied upon by [the PCRA court] itself." ***Commonwealth v. Singletary***, 803 A.2d 769, 772–73 (Pa. Super. 2002).

Appellant has failed to establish he was prejudiced by failure to appeal the December 2009 Order.

In light of the foregoing, we find Appellant's third PCRA petition was clearly untimely, and he failed to establish that any exceptions to the time-bar apply. As such, neither the PCRA court nor this Court has jurisdiction to address the substantive claims raised therein, and we have no basis to overturn the PCRA court's decision in this matter. ***Commonwealth v. Lewis***, 2013 WL 1182093, at *6 (Pa. Super. filed March 22, 2013).

Petition for Permission to Withdraw as Counsel granted. Order affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/6/2013