NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAMES FRAZIER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1479 EDA 2012

Appeal from the PCRA Order May 2, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0401251-1996

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: January 11, 2013

Appellant, James Frazier, appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, as untimely. We affirm.

On April 25, 1997, a jury convicted Appellant of murder of the first degree and possessing an instrument of crime (PIC) for his shooting of an unarmed victim through the heart and lungs. The court sentenced Appellant to a term of life imprisonment for the first degree murder conviction, and imposed a consecutive sentence of no less than one nor more than two years' incarceration on the PIC conviction. This Court affirmed Appellant's judgment of sentence on January 13, 2000 and no review was sought in our

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* Retired Senior Judge assigned to the Superior Court.

Supreme Court. (***See Commonwealth v. Frazier***, 752 A.2d 420 (Pa. Super. 2000) (unpublished memorandum)).

On February 13, 2001, Appellant filed a timely first *pro se* PCRA petition and appointed counsel filed a ***Turner*/*Finley***[1] no merit letter. The PCRA court dismissed Appellant's petition and this Court affirmed. (***See Commonwealth v. Frazier***, 830 A.2d 1045 (Pa. Super. 2003) (unpublished memorandum)).

On December 30, 2010,[2] Appellant filed a counseled serial PCRA petition.[3] On May 2, 2012, the court dismissed the petition as untimely, finding that the claims "asserted do not constitute exceptions to the time-bar." (PCRA Court Opinion, 5/02/12, at 2). Appellant timely appealed with the benefit of counsel.[4]

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[1] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

[2] Appellant failed to provide a copy of the petition to the PCRA court chambers and therefore the court did not receive it until November 8, 2011.

[3] The PCRA court states that this is Appellant's fifth petition, however Appellant and the Commonwealth represent that this is his fourth. (***See*** PCRA Ct. Op., 5/02/12, at 1; Appellant's Brief, at 3-4; Commonwealth's Brief, at 5).

[4] The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal. ***See*** Pa.R.A.P. 1925(b). The court filed a Rule 1925(a) opinion on June 18, 2012 in which it adopted the reasoning set forth in its May 2, 2012 opinion. ***See*** Pa.R.A.P. 1925(a).

Appellant raises five questions for our review in which he asserts ineffective assistance of trial counsel, a violation of the Fourteenth Amendment to the Constitution, and the existence of after-discovered facts. (***See*** Appellant's Brief, at 2). However, before we are able to consider the merits of Appellant's claims on appeal, we must determine whether the PCRA court properly determined that his petition was untimely, and that therefore it did not have jurisdiction to decide its merits.

Our standard of review for an order denying PCRA relief is well-settled:

> This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that a petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted).

Here, the PCRA court determined that Appellant's petition was untimely and did not properly plead an exception to the PCRA time-bar. (***See*** PCRA Ct. Op., 5/02/12, at 2; PCRA Court Rule 907 Notice, 04/09/12, at 1). We agree.

It is well-settled that:

> 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.[A.] § 9545(b)(1). A

> judgment becomes final at the conclusion of direct review by [Pennsylvania Supreme] Court or the United States Supreme Court, or at the expiration of the time for seeking such review. 42 Pa.C.S.[A.] § 9545(b)(3). 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. The timeliness requirements apply to all PCRA petitions, regardless of the nature of the individual claims raised therein. The PCRA squarely places upon the petitioner the burden of proving an untimely petition fits within one of the three exceptions.

Commonwealth v. Jones, 54 A.3d 14, 16-17 (Pa. 2012) (case citations and footnote omitted).

In the case *sub judice*, Appellant's judgment of sentence became final on February 14, 2000,[5] which was thirty days[6] after this Court affirmed his judgment of sentence. ***See*** 42 Pa.C.S.A. § 9545(b)(3). Therefore, he had one year from that date to file a petition for collateral relief unless he pleaded and proved that a timeliness exception applied. ***See id.*** at § 9545(b)(1)(i)-(iii). Accordingly, Appellant's current petition, filed on December 30, 2010, is untimely on its face unless he pleads and proves one of the statutory exceptions to the time-bar.

Section 9545 of the PCRA provides only three exceptions that allow for review of an untimely PCRA petition: (1) the petitioner's inability to raise a claim because of governmental interference; (2) the discovery of previously

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[5] February 12, 2000, fell on a Saturday.

[6] An appellant has thirty days to file a petition for review with our Supreme Court from the date of this Court's decision. ***See*** Pa.R.A.P. 1113(a).

unknown facts that would have supported a claim; and (3) a newly-recognized constitutional right. ***See id.*** at § 9545(b)(1)(i)-(iii). A PCRA petition invoking one of these statutory exceptions must "be filed within 60 days of the date the claim could have been presented." ***Id.*** at § 9545(b)(2).

Appellant attempts to argue that the discovery of previously unknown facts exception to the PCRA time-bar applies to this case. (***See*** Appellant's Brief, at 2, 17). Specifically, he alleges that his petition could claim the benefit of the exception to the PCRA's timeliness requirement because the affidavits of inmates Shawn Butler and John Berry, as well as Appellant's own affidavit, establish that he acted in self-defense when he shot and killed the victim. (***See id.*** at 17). We disagree.

Preliminarily, we note that the argument section of Appellant's brief utterly fails to provide pertinent discussion or citation to relevant authority in support of his assertion that the after-discovered facts exception of the PCRA applies to this case. (***See*** Appellant's Brief, at 13-17); ***see also*** Pa.R.A.P. 2119(a)-(c). Instead, after citing boilerplate law regarding the PCRA and non-binding federal decisions,[7] Appellant merely asserts that his "claim relies on the Affidavit of Shawn Butler dated December 2, 2010, the Affidavit of John Berry dated November 20, 2010, and the Affidavit of [Appellant] dated

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[7] "[I]t is well-settled that this Court is not bound by the decisions of federal courts, other than the United States Supreme Court[.]" ***Eckman v. Erie Ins. Exchange***, 21 A.3d 1203, 1207 (Pa. Super. 2012) (citation omitted).

November 29, 2010" and that, therefore, his December 30, 2010 PCRA petition was timely. (Appellant's Brief, at 17; ***see id.*** at 13-17). Accordingly, Appellant's argument that his petition is timely pursuant to Section 9545(b)(1)(ii) is waived. ***See*** Pa.R.A.P. 2101, 2119(a)-(c); ***see also Commonwealth v. Mitchell***, 883 A.2d 1096, 1108 (Pa. Super. 2005), *appeal denied*, 897 A.2d 454 (Pa. 2006) (waiving issues where appellant failed to cite pertinent legal authority or meaningfully develop claims). Moreover, it is without merit.

> The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence. Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have obtained the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced.

Commonwealth v. Monaco, 996 A.2d 1076, 1080 (Pa. Super. 2010), *appeal denied*, 20 A.3d 1210 (Pa. 2011) (citations omitted).

Appellant claims that the affidavits of Shawn Butler, John Berry and Appellant himself contain after-discovered facts "necessary to invoke the jurisdictional gateway" available under section 9545(b)(1)(ii) because they establish that Appellant acted in self-defense. (Appellant's Brief, at 17). Specifically, in his December 2, 2010 affidavit, prison inmate Shawn Butler alleges that he witnessed the victim shoot at a car immediately before he heard the gunshot that killed the victim, although he concedes that he did not see who was inside the vehicle. (***See*** Appellant's Memorandum of Law

Supporting Petition for Post Conviction Collateral Relief or, in the Alternative, for *Habeas Corpus*, 12/30/10, at Exhibit A).[8] Appellant claims that Butler's allegation that he witnessed the shooting is a previously unknown fact that satisfies the requirements of Section 9545(b)(1)(ii) because it would have established that Appellant acted in self-defense. (***See*** Appellant's Brief, at 12). We disagree.

First, Appellant fails to appreciate that "the after-discovered facts exception focuses on **facts**, **not** on a newly discovered or newly willing source for previously known facts[.]" ***Commonwealth v. Marshall***, 947 A.2d 714, 721 (Pa. 2008) (emphasis in original; internal quotation marks and citation omitted). If Appellant were acting in self-defense when he shot and killed the victim, he necessarily would have been aware of this fact prior to trial. Accordingly, he cannot now rely on a "newly willing source for [this] previously known fact[]" and his attempt to invoke the newly-discovered facts exception to the PCRA timeliness requirements would lack merit. ***Id.***; ***see also Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1269 (Pa. 2008), *cert. denied*, 555 U.S. 916 (2008) (concluding that alleging a new conduit for a previously known fact "does not transform [the] latest source into evidence falling within the ambit of § 9545(b)(1)(ii)") (citation omitted).

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[8] The November 20, 2010 affidavit of John Berry and Appellant's November 29, 2010 affidavit merely assert that Shawn Butler told them the same thing in November of 2010. (***See*** Appellant's Memorandum of Law, 12/30/10, at Exhibits B, C).

Additionally, Appellant failed to establish that he could not have discovered that Shawn Butler witnessed the shooting prior to trial with the exercise of due diligence. (***See*** Appellant's Brief, at 17); ***see also Commonwealth v. Yarris***, 731 A.2d 581, 590 (Pa. 1999) (after-discovered evidence claim fails where defendant "makes no attempt to explain why the information purportedly contained in these statements could not, with the exercise of due diligence, have been obtained much earlier"). Although Appellant argues that the failure to locate Mr. Butler sooner was the result of trial counsel's ineffectiveness, (***see*** Appellant's Brief, at 19), such a claim does not constitute an exception to the time-bar. ***See Commonwealth v. Breakiron***, 781 A.2d 94, 100 (Pa. 2001) ("[O]ur Court has expressly rejected attempts to utilize ineffective assistance of counsel claims as a means of escaping the jurisdictional time requirements for filing a PCRA petition.") (citations omitted); ***Commonwealth v. Lark***, 746 A.2d 585, 589 (Pa. 2000) (holding that "an allegation of ineffectiveness is not sufficient justification to overcome otherwise untimely claims"); ***Commonwealth v. Davis***, 816 A.2d 1129, 1135 (Pa. Super. 2003), *appeal denied*, 839 A.2d 351 (Pa. 2003) ("[A]ttempts to utilize ineffective assistance of counsel claims as a means of escaping the jurisdictional time requirements for filing a PCRA petition have been regularly rejected by our courts.") (citations omitted). Therefore, Appellant has failed to establish that he was unable to discover the information provided by Shawn Butler in the exercise of due

diligence and his claim that the after-discovered evidence exception to the PCRA timeliness requirements applies would fail, even if it were not waived.

Accordingly, we conclude that Appellant has failed to plead and prove an exception to the PCRA time-bar and that the PCRA court properly found that it lacked jurisdiction to review his claims. ***See Carter***, ***supra*** at 682.

Order affirmed.