

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

SEAN CARTER

Appellant

No. 149 WDA 2013

Appeal from the PCRA Order of November 19, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0004283-2006

BEFORE: FORD ELLIOTT, P.J.E., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED: February 3, 2014

Sean Carter appeals from the November 19, 2012 order dismissing his third petition for relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, as untimely. We affirm.

On direct appeal, we summarized the factual and initial procedural history of this case as follows:

Since October of 2005, [Carter] had been under the supervision of Agent Nicholas Sobol of the Pennsylvania Board of Probation and Parole. While under supervision, [Carter] was supposed to be living with his mother at 582 Ardmore Boulevard in Pittsburgh. On February 28, 2006, Agent Sobol received information that [Carter] was selling narcotics from the residence located at 7209 Fleury Way in Pittsburgh. Agent Sobol went to the Fleury Way residence accompanied by approximately six agents from the Board of Probation and Parole. When the

* Retired Senior Judge assigned to the Superior Court.

agents arrived at the residence, [Carter] opened the door. [Carter] was administratively detained and placed in handcuffs. [Carter] also informed Agent Sobol that he had purchased the residence. A female identified as Loretta Wade was observed standing in the living room with outerwear on. During a pat-down of Ms. Wade, agents recovered a single piece of crack cocaine weighing two ounces, a small amount of marijuana, and a crack pipe. No drugs or paraphernalia were found on [Carter's] person. The agents observed [that] the house was in a dilapidated condition, was sparsely furnished, and was not set up for housekeeping. Agents conducted a search of the immediate area[,] which included the living room. There, they found plastic baggies inside a night stand. On the living room sofa, the agents recovered a prescription bottle labeled with [Carter's] name, a sock containing a solid rock of crack cocaine weighing 35.63 grams, eighteen to twenty plastic baggies, and a cell phone.

[Carter] was arrested and charged with various drug offenses. [Carter] filed a motion to suppress, which was denied following a hearing. The case proceeded to a non-jury trial on March 27, 2007. At trial, the suppression hearing transcript was incorporated into the record. The Commonwealth also presented the testimony of Agent Sobol, Agent David Bole, Detective John McBurney[, and] expert testimony from Ray Bonacci of the Allegheny County District Attorney's Office Narcotics Enforcement Team. [Carter] testified in his own defense and denied informing Agent Sobol that he had purchased the Fleury Way residence. He also denied [that] he was engaged in selling crack cocaine from that address. At the close of the evidence, [Carter] was found guilty of [possession with intent to deliver ("PWID")], possession of a controlled substance, and possession of drug paraphernalia.¹ On June 19, 2007, [Carter] was sentenced to 5 to 10 years' imprisonment.

Commonwealth v. Carter, No. 1329 WDA 2007, slip op. at 1-3 (Pa. Super. June 9, 2008). We affirmed Carter's judgment of sentence on June 9, 2008.

¹ 35 P.S. §§ 780-113(a)(30), (16), and (32), respectively.

Id. at 1, 7. Carter did not seek allowance of appeal to the Pennsylvania Supreme Court.

On September 10, 2008, Carter filed a timely *pro se* PCRA petition, his first. The PCRA court denied that petition without a hearing. On February 19, 2010, we affirmed the PCRA court's order in an unpublished memorandum. **See Commonwealth v. Carter**, No. 546 WDA 2009 (Pa. Super. Feb. 19, 2010). Carter filed a petition for allowance of appeal, which our Supreme Court denied on July 21, 2010. **Commonwealth v. Carter**, 998 A.2d 958 (Pa. 2010) (*per curiam*).

On June 9, 2011, Carter filed a second *pro se* PCRA petition. On August 12, 2011, the PCRA court, concluding that Carter failed to satisfy the PCRA's strict time limit, **see** 42 Pa.C.S. § 9545(b)(1), dismissed Carter's second petition. In an unpublished *per curiam* memorandum, we affirmed the PCRA court's dismissal order, also concluding that Carter's petition was untimely. **Commonwealth v. Carter**, No. 1405 WDA 2011, slip op. at 6 (April 11, 2012). Carter did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

The PCRA court set forth the procedural events that occurred after Carter's second PCRA appeal as follows:

On March [21], 2012, during the pendency of his [second PCRA appeal] to the Superior Court, [Carter] filed a "NOTICE OF APPEAL [2012 NEW CASE LAW]." The Court entertained the filing under the Post-Conviction Relief Act. **Commonwealth v. Hall**, 771 A.2d 1232, 1135 (Pa. 2001) (quoting **Commonwealth v. Yarris**, 731 A.2d 581, 586 (Pa. 1999)). Because of the assertions made by [Carter] in his third PCRA,

counsel was appointed to represent [Carter] on April 17, 2012 – a date after the Superior Court issued its Opinion at No. 1405 WDA 2011.

On May 11, 2012, counsel filed a motion for leave to withdraw under ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). The motion was granted on May 30, 2012, and [Carter] was ordered to notify the Court in writing whether he wished to proceed with his PCRA. On June 18, 2012, [Carter] informed the Court that he wished to proceed with his petition.

On June 26, 2012, [Carter] filed a motion for leave to amend his PCRA. That motion was granted. On September 19, 2012, [Carter] filed a “MOTION TO PRESERVE AFTER-DISCOVERED EVIDENCE.” On October 3, 2012, [Carter] filed a “SUPPLEMENT TO AMEND P.C.R.A.” Notice was given on October 17, 2012, of [the] Court’s intent to dismiss [Carter’s] request for post-conviction relief because the petition was both time barred and meritless. [Carter] filed his objections to this notice on October 29, 2012. Additional objections to this Court’s notice of intention to dismiss were filed on November 7, 2012. On November 19, 2012, [Carter’s third] post-conviction was dismissed.

PCRA Court Opinion (“P.C.O.”), 3/18/2013, at 2-3 (grammar and citations modified).

On December 13, 2012, Carter filed a notice of appeal. Along with the notice of appeal, Carter filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On March 18, 2013, the PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a).

Carter raises two issues for our review:

- I. Whether (in) reviewing the property [*sic*] of the (“PCRA”) court’s dismissal of [Carter’s] third/subsequent PCRA filing, it was an abuse of discretion for the (“PCRA”) court “to determine that it was untimely filed under Title 42 Pa.C.S.A. §9545(b)(1) [*sic*] where the petition was timely filed under Title 42 Pa.C.S.A. §9545(b)(1)(i-iii) and §9545(b)(2)”, because the material set forth in [Carter’s]

subsequent petition pled and proved all three limited exceptions of the time-bar provisions?

- II. Whether the PCRA court erred and denied [Carter] his federal and state constitutional rights to due process of law by dismissing [Carter's] third/subsequent PCRA petition without an evidentiary hearing and accepting appointed counsel's "**Finley/ Turner** no-merit LETTER" as a basis for dismissal [*sic*] where [Carter] raised substantial questions of disputed facts regarding the timeliness of his subsequent "PCRA" filing?

Brief for Carter at 4.

Our standard of review regarding an order denying a PCRA petition is limited to whether the determination of the PCRA court is supported by the record and is free of legal error. **Commonwealth v. Ragan**, 923 A.2d 1169, 1170 (Pa. 2007). The PCRA court's findings will not be disturbed unless there is no support for that court's findings in the certified record. **Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001).

The central focus of this case is the timeliness of Carter's third PCRA petition. The time limitations on PCRA petitions have mandatory jurisdictional implications and may not be altered or disregarded in order to address the merits of a petition. **Commonwealth v. Harris**, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009). In **Commonwealth v. Jackson**, we articulated the timeliness standards under the PCRA as follows:

The PCRA "provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." 42 Pa.C.S.A. § 9542. When an action is cognizable under the PCRA, the PCRA is the "sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose[.]" 42 Pa.C.S.A. § 9542.

In order for a court to entertain a PCRA petition, a petitioner must comply with the PCRA filing deadline. **See Commonwealth v. Robinson**, 837 A.2d 1157, 1161 (Pa. 2003). The time for filing a petition is set forth in 42 Pa.C.S.A. § 9545(b), which provides in relevant part:

(b) Time for filing petition.—

(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.

* * *

42 Pa.C.S.A. § 9545(b).

“[T]he time limitations pursuant to . . . the PCRA are jurisdictional.” **Commonwealth v. Fahy**, 737 A.2d 214, 222 (Pa. 1999). “[Jurisdictional time] limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits.” *Id.* “If the petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition.” **Commonwealth v. Perrin**, 947 A.2d 1284, 1285 (Pa. Super. 2008).

Commonwealth v. Jackson, 30 A.3d 516, 518-19 (Pa. Super. 2011), *appeal denied*, 47 A.3d 845 (Pa. 2012).

Carter's judgment of sentence became final on or about July 9, 2008, when the period for filing a petition for allowance of appeal with the Pennsylvania Supreme Court elapsed. **See** 42 Pa.C.S. § 9545(b)(3) (“[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.”). Thus, Carter had until July 9, 2009 to file a timely PCRA petition. Carter did not file his third PCRA petition until March 21, 2012, rendering the petition facially untimely by almost three years. Therefore, to establish jurisdiction over his petition, Carter must have specifically alleged and proved one of the exceptions set forth at 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii).

Throughout his filings, which include the original petition and at least one supplemental filing, Carter made multiple attempts to satisfy one of the PCRA's three exceptions to the time bar. We will address each in turn.

In his original filing, Carter first attempted to establish jurisdiction under the newly recognized constitutional right exception. **See** 42 Pa.C.S. § 9545(b)(1)(iii); “NOTICE OF APPEAL [2012 NEW CASE LAW]”, filed 3/21/2012, at 2. To successfully invoke this exception, Carter must demonstrate not only that a new constitutional right has been recognized by either the Pennsylvania Supreme Court or the United States Supreme Court, but also that the Court has held that the newly recognized right applies

retroactively. **See** § 9545(b)(1)(iii). Carter appears to predicate his claim upon the United States Supreme Court's decision in **Maples v. Thomas**, 132 S.Ct. 912 (2012). In **Maples**, the Supreme Court held that an attorney's complete abandonment of a client in a state post-conviction proceeding, which left the petitioner unrepresented at a critical time, may serve as cause to excuse a procedural default for federal *habeas corpus* review. **Id.** at 917. The Court did not recognize a new constitutional right that would apply to Carter's case, nor was any such right held to apply retroactively. Thus, Carter's assertion of the new constitutional right exception to the PCRA's time bar is unavailing.

Also in his March 21, 2012 filing, Carter attempted to establish the PCRA court's jurisdiction by asserting the newly discovered facts exception. **See** 42 Pa.C.S. § 9545(b)(1)(ii). Carter does not indicate precisely the nature of the newly discovered facts. Carter alludes to a witness that was referenced in an earlier PCRA petition. Carter does not identify this witness, nor does he expound upon what information that this witness possesses that would constitute newly discovered facts for the purposes of the exception. Moreover, Carter does not explain why he could not have discovered this witness, and the information possessed by the witness, with due diligence at the time of trial. **Id.** Consequently, Carter failed to prove the applicability of the newly discovered fact exception.

In his amended PCRA petition, Carter again attempted to satisfy the newly discovered fact exception by arguing that he had recently learned

from the Allegheny County Recorder of Deeds that the address 7209 Fleury Way does not exist. At trial, Carter was found inside of a home on Fleury Way that contained drugs and drug distribution paraphernalia. The Commonwealth maintained that the address of this home was 7209 Fleury Way. Carter argued in his amended petition that, had the recently discovered information that the address does not exist been presented at trial, the result of the trial would have been different. **See** Defendant's SUPPLEMENT TO AMEND P.C.R.A., 10/5/2012, at 2. Assuming, *arguendo*, that Carter's factual claim is accurate, that no such address exists, Carter made no effort to demonstrate that this information could not have been ascertained at the time of trial with the exercise of due diligence. **See** 42 Pa.C.S. § 9545(b)(1)(ii) (Requiring proof that "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."). Hence, his claim that this information warrants application of the newly discovered fact exception necessarily fails.

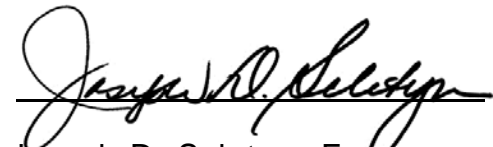
Finally, in his amended PCRA petition, Carter maintained that the United States Supreme Court's decision in ***Martinez v. Ryan***, 132 S.Ct. 1309 (2012), created a new constitutional right and applied retroactively so as to satisfy subsection 9545(b)(1)(iii). ***Martinez***, as was the case in ***Maple***, dealt exclusively with a federal court's ability to review a case for federal habeas corpus purposes that contained a procedural default during the state court proceedings. The case did not establish any new

constitutional right that is applicable to Carter, nor did it hold that any constitutional right should apply retroactively. Therefore, **Martinez** cannot serve as a basis to establish the newly recognized constitutional right exception to the PCRA's time-bar.

Carter's third PCRA petition was facially untimely. For the preceding reasons, Carter did not establish the applicability of any of the exceptions to the PCRA's strict time limitation. As such, the PCRA court was without jurisdiction to rule upon the merits of the petition. Additionally, in response to Carter's second stated issue, because of our holding that the petition was untimely, the PCRA court also did not abuse its discretion in accepting counsel's **Turner/ Finley** letter and granting counsel's motion to withdraw as counsel.

Order affirmed.

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: 2/3/2014

