NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. HARRY JOSEPH BUTRY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1491 MDA 2012

Appeal from the Order entered July 20, 2012,
in the Court of Common Pleas of Luzerne County,
Criminal Division, at No(s): CP-40-CR-0002981-1997.

BEFORE: DONOHUE, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.: Filed: March 14, 2013

Harry Joseph Butry ("Appellant") appeals from the order denying his second petition for post-conviction relief filed pursuant to the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

The pertinent facts and procedural history have been summarized as follows:

> In early July [] 1997, [the victim] moved out of an apartment she shared with [Appellant]. [The victim] and [Appellant] had two children together. Appellant had attempted to kill himself on several occasions and prior to the murder, he had repeatedly threatened to carry out his suicide. Just prior to the shooting, [Appellant] obtained access to the murder weapon, a gun, which he had applied for a few weeks earlier. On August 21, 1997, [Appellant] shot [the victim] five times in the parking lot of a personal care facility following a verbal argument. On January 16, 1998, a jury convicted [Appellant] of first degree murder. Following the imposition of sentence and the denial of his post-sentence motions, [Appellant] filed this timely appeal.

Commonwealth v. Butry, 748 A.2d 766 (Pa. Super. 1999), unpublished memorandum at 1. On October 15, 1999, this Court affirmed Appellant's judgment of sentence. Our Supreme Court denied Appellant's petition for allowance of appeal on May 18, 2000. ***Commonwealth v. Butry***, 758 A.2d 1195 (Pa. 2000).

Appellant filed his first *pro se* PCRA petition on December 22, 2008. PCRA counsel was appointed, and the PCRA court issued Pa.R.Crim.P. 907 notice of its intent to dismiss the petition without a hearing. On July 8, 2009, the PCRA court dismissed Appellant's petition as untimely filed. Appellant filed a timely appeal to this Court. In an unpublished memorandum filed on October 25, 2010, we affirmed the PCRA court's order denying Appellant post-conviction relief, and granted PCRA counsel's petition to withdraw.[1] ***Commonwealth v. Butry***, 15 A.3d 540 (Pa. Super. 2010). Our Supreme Court denied Appellant's petition for allowance of appeal on May 9, 2011. ***Commonwealth v. Butry***, 21 A.3d 1189 (Pa. 2011). On October 3, 2011, the United States Supreme Court denied Appellant's petition for writ of *certiorari*.

On October 18, 2011, Appellant filed a *pro se* "Petitioner's Petition for Habeas Corpus Relief Pursuant to Article 1, § 14 of the Pennsylvania Constitution and for other Collateral Relief Pursuant to 42 Pa.C.S.A. §§ 6502

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

and 6504 and Consolidated Memorandum of Law." Within this petition, Appellant asserted that he established an exception to his otherwise untimely second PCRA petition. The PCRA court appointed counsel, and on May 8, 2012, held a hearing on Appellant's petition. On July 20, 2012, the PCRA court entered an order denying and dismissing Appellant's PCRA petition for post-conviction relief. This timely appeal followed. The PCRA court did not require Pa.R.A.P. 1925 compliance.

Appellant raises the following issue:

> Did the [PCRA] court err and/or abuse its discretion in dismissing the PCRA [petition] of [Appellant] and in finding that the basis for the requested relief did not fall within 42 Pa.C.S.A. §9545(b)(2)?

Appellant's Brief at 5.

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). We pay great deference to the findings of the PCRA court, "but its legal determinations are subject to our plenary review." ***Id.*** Furthermore, because this is Appellant's second petition for post-conviction relief, he must meet a more stringent standard. "A second or any subsequent post-conviction request for relief will not be entertained unless a strong *prime facie* showing is offered to demonstrate that a miscarriage of justice may have occurred." ***Commonwealth v. Burkhardt***, 833 A.2d 233, 236 (Pa. Super. 2003) (*en*

banc) (citations omitted). "A petitioner makes a *prime facie* showing if he demonstrates that either the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged." ***Id.***

Appellant claims that the PCRA court erred in concluding that his second PCRA petition was untimely because he did not meet his burden of proof regarding the PCRA's time-bar exception 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." 42 Pa.C.S.A. § 9545(b)(1)(ii). According to Appellant, "despite the passing of approximately 10½ years, he did not have the ability to discover the issues which he has now raised and which he learned from family members, as well as, his requests under the Right to Know law served upon the Luzerne County Clerk of Courts and medical facilities." Appellant's Brief at 12. We disagree.

Initially, we note that the PCRA court properly treated this filing as a petition under the PCRA. ***See generally***, ***Commonwealth v. Peterkin***, 722 A.2d 638, 639 n.1 (Pa. 1998) (stating that the PCRA subsumes other post-conviction remedies). The timeliness of a post-conviction petition is jurisdictional. ***Commonwealth v. Murray***, 753 A.2d 201, 203 (Pa. 2000). 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 is final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. sections 9545(b)(1)(i), (ii), and (iii), is met. ***See Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S.A. § 9545. A PCRA petition invoking one of these statutory exceptions must "be filed within 60 days of the date the claims could have been presented." ***Id.*** at 783. ***See also*** 42 Pa.C.S.A. § 9545(b)(2).

In this case, Appellant's judgment of sentence became final on August 16, 2000, when the ninety-day time period for filing a writ of certiorari with the United States Supreme Court expired. ***See*** U.S.Sup.Ct.R. 13; 42 Pa.C.S.A. § 9545(b)(3). Therefore, Appellant had to file this PCRA petition by August 16, 2001, in order for it to be timely. As Appellant filed the instant petition on October 18, 2011, it is patently untimely unless he has satisfied his burden of pleading and proving that one of the enumerated exceptions applies. ***See Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999).

Appellant presents two different arguments in support of his claim that he met the "newly discovered" evidence exception to the PCRA's time constraints. First, Appellant asserts "at the end of July/ beginning of August, he received information from his son Harry regarding the alleged relationship [between] the victim and Juror No. 11." Appellant's Brief at 12. Somewhat

cryptically, Appellant describes this relationship as follows: "Juror No. 11 was the Uncle of the victim's brother, William Gorman's son, who had a child, Eric with Juror No. 11's sister, Lori Baranoski, prior to the incident occurring." Appellant's Brief at 10.

The PCRA court rejected Appellant's claim, and cited the following as the only evidence presented by Appellant at the evidentiary hearing in support of his claim:

> [BY PCRA COUNSEL:]
>
> Q. So you were attempting to acquire further information regarding what you list in your Petition as Juror No. 11, who is Mr. Baranoski?
>
> A. Right. The only reason I got Juror No. 11, because the transcript I do have, at the end of the trial, it has Juror No. 11, Joseph Baranoski[.]
>
> * * *
>
> Q. So, part of – one of your first claims, within the habeas petition is that, upon your investigation, you believe there is a possible family connection between one of the jurors and the victim in this case?
>
> A. Correct.

N.T., 5/8/12, at 7-8. The PCRA court concluded that this evidence was not sufficient to meet Appellant's burden. We agree.

Appellant has not met his burden of identifying the date on which he first discovered this new evidence. This fact alone is fatal to his claim. ***See Commonwealth v. Vega***, 754 A.2d 714, 718 (Pa. Super. 2000) (explaining that the burden is on the petitioner to prove specific facts to show he acted

promptly and filed the petition within sixty days). Additionally, Appellant has not established sufficiently his claim that he exercised due diligence in discovering this evidence; in fact, Appellant provides no explanation for why it took over ten years to learn this information. ***See Commonwealth v. Yarris***, 731 A.2d at 588-91 (Pa. 1999) (setting forth statutory requirement for overcoming time bar based upon newly discovered evidence exception and determining that the PCRA petitioner failed to carry his burden of establishing that the evidence could not have been ascertained earlier). Thus, Appellant has not established an exception to the timeliness restrictions of the PCRA based on this claim.

Appellant also claims "information discovered as to his suffering from Major Depression at the time of the crime, that required Psychiatric Treatment, was newly discovered facts" that would establish an exception to the PCRA's time bar. Appellant's Brief at 10. Appellant asserts that "he was not aware of his diagnosis at the time of his jury trial, and that his mental state was not used as a defense during his jury trial." ***Id.*** at 13. According to Appellant, "he never reviewed nor received any medical reports until August 2012." ***Id.*** Although Appellant claims that he never received a complete copy of his medical/mental health records, "upon receipt of the few pages he was able to obtain, he immediately filed his [petition] within sixty (60) days thereof." ***Id.***

The PCRA court concluded that this claim of newly discovered evidence was refuted by the averments of Appellant's PCRA petition. Specifically, within the petition, Appellant averred that his trial counsel was in possession of his medical/mental health records, but the trial court "refused and declined [Appellant's] attorney the right to introduce [them] at trial." ***See*** PCRA Court Opinion, 7/20/12, at 5. According to Appellant, these records "revealed that [he] suffered from a major depression and NOS at the time of the crime which required psychiatric treatment." ***Id.*** Because the PCRA court concluded that Appellant knew of this information prior to his trial, it cannot later be used to establish the newly discovered evidence exception to the PCRA's time bar.

Once again, our review of the record supports this determination. Prior to the beginning of trial, Appellant's trial counsel sought to withdraw at Appellant's request, because he "failed to pursue an investigation of a mental infirmity defense, including an insanity defense." N.T., 1/13/98, at 3. Trial counsel informed the trial court that he had Appellant examined by a forensic scientist to determine if an insanity defense should be pursued at trial. ***Id.*** Thereafter, Appellant changed his mind, and informed the trial court he no longer wanted counsel to withdraw. ***Id.*** at 4. Thus, because the record supports the PCRA court's conclusion that Appellant was aware of the medical/mental health records prior to trial, Appellant cannot use the

diagnosis within those records to support his claim of "newly discovered" evidence.

In sum, Appellant's second PCRA petition is untimely, and Appellant has failed to meet his burden of proving a time bar exception. Thus, the PCRA court correctly denied Appellant post-conviction relief.

Order affirmed.