

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
FRANK FLUELLEN/JAMES CUNNINGHAM,	:	
	:	
Appellant	:	No. 1492 EDA 2012

Appeal from the PCRA Order March 30, 2012,
Court of Common Pleas, Philadelphia County,
Criminal Division at Nos. CP-51-CR-0301241-2000
and CP-51-CR-0301251-2000

BEFORE: DONOHUE, MUNDY and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED JUNE 03, 2013

Frank Fluellen, a.k.a. James Cunningham (“Appellant”), appeals from the order of court dismissing his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541 – 9546. We affirm.

In December 2000, Appellant was convicted of robbery, burglary and conspiracy. On May 2, 2001, he was sentenced to an aggregate term of 40 to 80 years of imprisonment. This Court affirmed his judgment of sentence on direct appeal, *see Commonwealth v. Cunningham*, 805 A.2d 566 (Pa. Super. 2002), and Appellant’s petition for allowance of review was denied by the Supreme Court of Pennsylvania on March 6, 2003.

Appellant filed his first PCRA petition in 2003, which the PCRA court ultimately dismissed. Appellant filed three more PCRA petitions, none of which afforded him relief, before filing the petition presently at issue on

September 23, 2009. The PCRA court dismissed Appellant's petition without a hearing on March 30, 2012 "finding that his petition was untimely and failed to meet any of the three timeliness exceptions." PCRA Court Opinion, 12/5/12, at 1.

On appeal, Appellant argues that the PCRA court applied the wrong standard in arriving at its conclusion that he failed to meet an exception to the PCRA's timeliness requirements. Appellant's Brief at 1.

Our review of a PCRA court's grant or denial of relief is limited to examining whether the court's determination is supported by the evidence and whether it is free of legal error. This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. The findings of a post-conviction court will not be disturbed unless they have no support in the record.

Commonwealth v. Hickman, 799 A.2d 136, 140 (Pa. Super. 2002) (internal citations omitted).

It is well established that "[t]he PCRA's timeliness requirements are jurisdictional in nature, and a court may not address the merits of the issues raised if the PCRA petition was not timely filed." ***Commonwealth v. Copenhefer***, 596 Pa. 104, 108, 941 A.2d 646, 648-49 (2007). The PCRA provides in relevant part as follows:

(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:

(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;

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. § 9545(b).

Appellant's judgment of sentence became final on or about June 6, 2003, which marked the conclusion of the period in which he could have sought review of the Pennsylvania Supreme Court's rejection of his petition for allowance of appeal with the United States Supreme Court. **See** U.S.SUP.CT.R. 13. The petition at issue was filed on September 23, 2009, more than six years after Appellant's judgment became final. The basis of this PCRA petition was Appellant's allegation that he was in possession of "after discovered exculpatory evidence [that] Police Officer Charline [sic] Solomon[] was arrested and convicted for [sic] filing false police reports (falsifying [d]ocuments and lying to authorities)[.]" PCRA Petition, 9/23/09, at 3. Appellant further alleged that "[t]his claim was discovered on [September 5, 2009], and is therefore timely filed pursuant to 42 Pa.C.S. § 9545(b)(1)(i-ii)[,](2)." **Id.** at 7. Thus, Appellant, apparently aware that he was required to meet one of the statutory exceptions to the PCRA's time-bar, alleged that he was unaware of the facts upon which his claim is

predicated (Officer Solomon's arrest and conviction for various crimes) until September 5, 2009, and that he filed his PCRA petition within 60 days of becoming aware of these facts. However, Appellant has failed to allege, much less establish, that he could not have ascertained these facts earlier by the exercise of due diligence. **See** 42 Pa.C.S.A. § 9545(b)(1)(ii). The document Appellant submits in support of his claim is a news release from the Philadelphia Police Department, bearing the date December 30, 2005. **See** Petitioner's Response to Rule 907 Notice, 2/23/12, at Exhibit A. Thus, Appellant **could** have ascertained the facts upon which he bases his claim as of the date of this news release, which was almost four years before he filed the PCRA petition at issue, yet he provides no explanation of why he did not discover these facts prior to September 5, 2009.

Furthermore, we must conclude that Appellant failed to raise this claim within 60 days of the date it could have been presented, as required by § 9545(b)(2). By virtue of Appellant's own documentation, the facts upon which he bases this claim were publically available as of December 30, 2005.¹ Appellant was therefore required to bring this claim within 60 days of that date. **See Commonwealth v. Lopez**, ___ Pa. ___, ___, 51 A.3d 195, 196 (2012) (holding that where the "facts were ... in the public record for

¹ The PCRA court states that Officer Solomon was convicted of these crimes in 2007. There is no evidence of record to support this finding. The only evidence that speaks to Officer Solomon's criminal charges is the news release Appellant attached to his response to the Rule 907 Notice of Intention to Dismiss.

longer than 60 days before th[e] petition was filed, the petition is time-barred” regardless of when the petitioner allegedly became aware of the facts). Because Appellant failed to do so, he has failed to meet an exception to the jurisdictional time-bar. **Id.**

We note Appellant’s contention that the PCRA court erred in considering the merits of his claim when evaluating whether he met the time-bar exception contained in 42 Pa.C.S.A. § 9545(b)(1)(ii). **Id.** We have reviewed the PCRA court’s opinion, and it does appear that the PCRA court considered the merits of Appellant’s claim in arriving at its conclusion. **See** PCRA Court Opinion, 12/5/12, at 4-6. This was in error. **See Commonwealth v. Bennett**, 593 Pa. 382, 394-95, 930 A.2d 1264, 1271-72 (2007) (holding that there is no analysis of the merits of the claim when determining whether the exception contained in § 9545(b)(1)(ii) is met). However, “[i]t is well settled that where the result is correct, an appellate court may affirm a lower court's decision on any ground without regard to the ground relied upon by the lower court itself.” **Commonwealth v. Singletary**, 803 A.2d 769, 772-73 (Pa. Super. 2002). Accordingly, having found that Appellant is jurisdictionally time-barred, we affirm the PCRA court’s order.

Order affirmed.

J-S29011-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambitt", written over a horizontal line.

Prothonotary

Date: 6/3/2013