

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
	:	
v.	:	
	:	
STEVEN WAYNE BENDER,	:	
	:	
Appellant	:	
	:	No. 1708 WDA 2012

Appeal from the PCRA Order entered October 12, 2012,
in the Court of Common Pleas of Fayette County,
Criminal Division, at No(s): CP-26-CR-0000801-2000.

BEFORE: SHOGAN, OTT, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: FILED: June 5, 2013

Steven Wayne Bender (Appellant) appeals *pro se* from the order entered November 12, 2012, dismissing his fifth petition filed pursuant to the Post Conviction Relief Act (PCRA).¹ We affirm.

A prior panel of this Court addressed the factual and procedural history of this case as follows.

This case has a long and convoluted history, which we summarize for the sake of brevity and to facilitate our review. The crimes arose out of Appellant’s illegal entry on May 13, 2000, at two-thirty in the morning, with a twelve gauge shotgun, into the home of his estranged wife’s boyfriend (the victim). Appellant found his wife and child, the victim, and the victim’s goddaughter all asleep in the victim’s bedroom. He fatally shot the victim three times with the shotgun, kicking him in the head after he had fallen, pointed the shotgun at his wife and child, and threatened to kill the wife.

¹ 42 Pa.C.S. §§ 9541-9546.

* Retired Senior Judge assigned to the Superior Court.

Other evidence presented to the jury tended to show that Appellant had previously threatened to kill the victim, purchased a shotgun from a fellow prison guard shortly before the murder on the false pretext of turkey hunting, and proposed to another fellow prison guard that they kill each other's estranged spouse, before the fatal shooting. (**See Commonwealth v. Bender**, No 1319 WDA 2001, unpublished memorandum at 1-3 (Pa. Super. filed December 31, 2002), citing Trial Court Opinion, 11/16/01, at 2-4).

Appellant's identity as the shooter was never at issue. (**See** N.T. Trial, 7/09/01, at 32, Defense Opening Statement). Rather, Appellant claimed at trial that the victim was sexually molesting his then two-year old daughter, so he entered the house and bedroom to take his daughter away, and shot the victim when he lunged at Appellant. (**See id.**, 7/12/01, at 108). [Appellant did not in fact remove his daughter. (**See** N.T. Trial, 7/12/01, at 132).] On cross-examination, he initially claimed he had contacted Children and Youth Services about his claim of molestation, but subsequently admitted he had not. (**See id.** at 117, 118). Nor did Appellant try to have his daughter medically examined. (**See id.** at 121). [Hospital records of Appellant's daughter showed she had no signs of sexual abuse. (**See Commonwealth v. Bender**, Nos. 796 WDA 2002, and 1720 WDA 2004, unpublished memorandum at 7 (Pa. Super. filed April 29, 2005)).] He claimed he had contacted state and local police, but could not recall names or other specific information. (**See id.** at 120). Appellant had filed a petition for modification of custody on April 28, 2000, about two weeks before the murder, but did not mention molestation in the petition. (**See id.** at 123-128).

The jury convicted Appellant of murder of the second degree, two counts of aggravated assault, one count of burglary, three counts of reckless endangerment, and one count of terroristic threats. The trial court immediately sentenced him to life imprisonment plus an aggregate consecutive term of seven to twenty-four years' incarceration. Appellant did not file post sentence motions. This Court affirmed the judgment of sentence on direct appeal. (**See Commonwealth v. Bender**, No 1319 WDA 2001, unpublished memorandum (Pa. Super. filed December 31, 2002). Appellant did not petition for allowance of appeal with our Supreme Court. (**See** Appellant's Brief, at 6). Appellant subsequently filed four petitions for PCRA relief, [all containing claims concerning what he believes to be a vast

conspiracy between the Commonwealth, trial counsel, and the police department to cover up evidence of sexual and physical abuse of his minor daughter], which were all rejected. [Additionally, at some point in 2004, Appellant filed a civil suit against the Fayette County District Attorney alleging nonfeasance and misconduct in the investigation and prosecution of child sexual abuse. Additionally, Appellant also filed a *pro se* motion seeking, *inter alia*, DNA testing. A panel of this Court rejected Appellant's petition on June 4, 2012. **See Commonwealth v. Bender**, 107 WDA 2012, unpublished memorandum (Pa. Super. filed June 4, 2012).]

Commonwealth v. Bender, 107 WDA 2012, at 1-3, unpublished memorandum (Pa. Super. filed June 4, 2012).

On September 19, 2012, Appellant filed the PCRA petition at issue on this appeal. In that petition, Appellant alleged that the Fayette County District Attorney's Office should not have been permitted to prosecute his case due to a conflict of interest stemming from the alleged conspiracy to cover up the sexual abuse of his daughter. Accordingly, Appellant alleged that prosecution of this case should have been transferred to the Pennsylvania Attorney General under section 732-205 of the Pennsylvania Administrative Code.²

² Section 732-205 of the Administrative Code provides, in relevant part,

(5) When the president judge in the district having jurisdiction of any criminal proceeding has reason to believe that the case is a proper one for the intervention of the Commonwealth, he shall request the Attorney General to represent the Commonwealth in the proceeding and to investigate charges and prosecute the defendant. If the Attorney General agrees that the case is a proper one for intervention, he shall file a petition with the court and proceed as provided in paragraph (4) [related to the procedure used by the Attorney General to petition the court for permission to supersede the district attorney in order to

On September 20, 2012, the PCRA court issued its notice of intent to dismiss Appellant's petition without a hearing. Appellant filed timely objections. Nonetheless, the PCRA court dismissed Appellant's petition on October 12, 2012, concluding that the petition was untimely without exception. This appeal followed.³

Appellant presents the following issues for our review:

I. In a matter of first impression, whether the [PCRA court] erred, as a matter of law, in denying [Appellant's] PCRA invoking 42 P.S. § 9545(b)(1)(i) proving governmental interference with the initial collateral review proceedings that denied [Appellant] the ability, of reason by an impartial prosecutor per 71 P.S. § 732(a)(3) because of an action filed per 16 P.S. §1405 (Misconduct of district attorney) & 1406 (District Attorney charged with crime) that prejudiced petitioner's presentation of his claims and fundamental fairness and procedural due process rights on collateral review where [Appellant] has been diligent in his attempts to expose sexual abuse of children/pedophilia in the particular and material facts of the matter?

II. Whether the [PCRA court] erred, as a matter of law, in failing to notify the President Judge per 71 P.S. 732-205(a)(5) that resulted in governmental interference under 42 Pa.C.S. § 9545(b)(1)(i) on [Appellant's] initial collateral proceedings that denied Petitioner the ability of reason by an impartial prosecutor on collateral proceedings denying [Appellant] procedural due process & fundamental fairness where [Appellant] is attempting to expose sexual abuse of children/pedophilia?

prosecute a criminal action or to institute criminal proceedings.] If the Attorney General determines that the case is not a proper case for intervention, he shall notify the president judge accordingly.

71 P.S. § 732-205(a)(5).

³ The PCRA court did not require Appellant to file a Pa.R.A.P. 1925(b) statement of matters complained of on appeal, and none was filed.

Appellant's Brief at 4.

This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. **Commonwealth v. Burkett**, 5 A.3d 1260, 1267 (Pa. Super. 2010) (citations omitted). "In evaluating a PCRA court's decision, 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 trial level." **Id.**

Generally, a PCRA petition must be filed within one year from the date a judgment becomes final. 42 Pa.C.S. § 9545(b)(1). There are three exceptions to this time requirement: (1) interference by government officials in the presentation of the claim; (2) newly discovered facts; and (3) an after-recognized constitutional right. 42 Pa.C.S. § 9545(b)(1)(i-iii). When a petitioner alleges and proves that one of these exceptions is met, the petition will be considered timely. **See Commonwealth v. Gamboa-Taylor**, 753 A.2d 780, 783 (Pa. 2000). A PCRA petition invoking one of these exceptions must "be filed within 60 days of the date the claims could have been presented." **Id.** (quoting 42 Pa.C.S. § 9545(b)(2)). The timeliness requirements of the PCRA are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely petitions. **Commonwealth v. Robinson**, 837 A.2d 1157, 1161 (Pa. 2003).

Commonwealth v. Brandon, 51 A.3d 231, 233 -234 (Pa. Super. 2012).

In his brief, Appellant acknowledges that his petition is patently untimely, but contends that it qualifies for an exception to the timeliness requirements, invoking the newly discovered evidence and government interference exceptions to the time bar. Appellant's Brief at 10-11, 13. In support of his argument, Appellant avers that he is in receipt of "a material letter"⁴ from the Attorney General's office, which contains "new information"

⁴ The form letter advises Appellant that his correspondence has been forwarded to the Attorney General's Criminal Law Division, but reiterates

relative to his allegations of a child sexual abuse cover-up in Fayette County. Appellant's Brief at 11. Appellant alleges that he filed this petition within 60 days of receiving this new information, as required by the PCRA. ***Id.*** Appellant also argues that the Fayette County District Attorney's failure to transfer this case to the Attorney General for prosecution is sufficient to prove governmental interference. ***Id.***

The PCRA court disagreed and dismissed Appellant's petition without a hearing, concluding that "no facts . . . asserted therein [] bring it within the purview of one of the exceptions to the timeliness requirement or require a hearing." PCRA Court Opinion, 10/12/2012, at 1. Moreover, the court noted that Appellant failed to provide a valid explanation of the alleged interference by government officials that prevented him from raising the instant claims earlier. Additionally, the court concluded that

if a conflict of interest existed at the time of the hearing on [Appellant's] first PCRA petition because of the filing of [Appellant's] civil suit, as [Appellant's] instant [petition] states at great length, [Appellant] certainly knew about the alleged conflict at that time, and could have and should have raised such claim then, either before [the PCRA court] or on appeal.

Id. at 1-2.

Our review of the record supports the PCRA court's conclusion that Appellant is attempting to resurrect his previously litigated claims under the

that jurisdiction over child sexual abuse "rests with the District Attorney in the county in which the sexual abuse occurred." The letter recommends that Appellant file a complaint regarding the alleged abuse with his local district attorney.

guise of “exposing” a conflict of interest and conspiracy theory that Appellant has been unsuccessfully litigating for years.⁵ Because Appellant has failed to plead and prove any exception to the PCRA time bar, his petition is untimely, and the PCRA court had no jurisdiction to entertain its merits. ***Commonwealth v. Wrecks***, 931 A.2d 717, 720 (Pa. Super. 2007). Therefore, the court did not err in dismissing the petition.

Even if Appellant did assert a valid timeliness exception to the PCRA, he would not be eligible for relief as his claims have been previously litigated. 42 Pa.C.S. § 9543(a)(3). The PCRA statute subsequently defines previous litigation as follows:

(a) Previous litigation.--For purposes of this subchapter, an issue has been previously litigated if:

* * *

(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue.

42 Pa.C.S. § 9544(a)(2).

The thinly guised allegations of a conspiracy contained in Appellant’s petition fail to clear this procedural hurdle. Our Court has addressed repeatedly his allegations that a conspiracy exists to cover up such abuse.

See Commonwealth v. Bender, 796 WDA 2004 & 1720 WDA 2004,

⁵ As a previous panel of this Court explained: “[w]e refuse to reward [Appellant’s] transparent attempt to substitute pithy allegations of conspiracy theories in place of factual averments, and therefore find no basis on which to apply the governmental interference exception to the instant case.” ***Commonwealth v. Bender***, 1905 WDA 2007, at 7, unpublished memorandum (Pa. Super. filed Oct. 27, 2008).

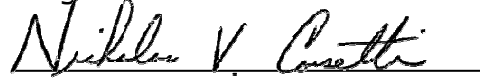
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unpublished memorandum (Pa. Super. filed Feb. 22, 2005) (discussing, *inter alia*, Appellant's claims that the Commonwealth engaged in a conspiracy to hide evidence of the sexual abuse of his daughter; that trial counsel failed to address the cover-up as part of Appellant's defense due to his alleged involvement in the conspiracy; and, that the PCRA court's denial of a second evidentiary hearing was detrimental to Appellant's ability to further litigate the conspiracy); **Commonwealth v. Bender**, 1905 WDA 2007, unpublished memorandum (Pa. Super. filed Oct. 27, 2008) (finding meritless Appellant's claim that his PCRA petition was timely under the governmental interference exception where Appellant argued that the trial court's refusal to instruct the jury on justifiable homicide was a deliberate attempt on the part of the trial court to conceal evidence of sexual abuse); **Commonwealth v. Bender**, 1790 WDA 2009, unpublished memorandum (Pa. Super. filed Nov. 3, 2010) (dismissing Appellant's PCRA on the basis that it was untimely filed and Appellant failed to prove the exception of governmental interference related to his claims of a conspiracy to cover up child sexual abuse). Accordingly, even if Appellant was able to plead and prove an exception to the time bar, he would not be eligible for relief.

Order affirmed.

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Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casetta", is written over a horizontal line.

Deputy Prothonotary

Date: June 5, 2013