

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL BOYD,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1853 EDA 2011

Appeal from the PCRA Order June 17, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0604191-1999

BEFORE: BOWES, GANTMAN, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.:

Filed: March 8, 2013

Michael Boyd appeals from the June 17, 2011 order dismissing his PCRA petition as untimely filed. We affirm.

On April 25, 1999, Appellant shot Bradley Hicks to death on West Oakdale Street, Philadelphia, in front of eyewitnesses Josephine Butts and Paul Ketter. Appellant was aided by an unidentified man who stood nearby holding a gun. Two weeks before the shooting, Ms. Butts saw Appellant place a gun against Mr. Hicks's head on Oakdale Street, steal a watch, and warn him against returning to the area.

On October 25, 2000, a jury found Appellant guilty of first-degree murder, possession of an instrument of crime, conspiracy, and robbery. After the jury decided not to impose the death penalty, Appellant was sentenced to life imprisonment. Appellant filed a timely appeal, which was

dismissed due to counsel's failure to file a brief. After reinstatement of his right to appeal, Appellant's judgment of sentence was affirmed on June 30, 2003, ***Commonwealth v. Boyd***, 832 A.2d 533 (Pa.Super. 2003), and Appellant did not seek further review.

On May 22, 2008, Appellant filed his first PCRA petition *pro se*. In that petition, he averred that he was entitled to a new trial based upon both ineffective assistance of prior counsel and newly-discovered evidence. Appellant charged trial counsel with ineffectiveness for neglecting to call eight witnesses on his behalf, four of whom were character witnesses. The recently-discovered evidence consisted of an April 10, 2008 newspaper article that indicated that court-appointed counsel were not adequately paid and failed to properly represent their clients. Before PCRA counsel was appointed, Appellant filed an amended PCRA petition raising additional allegations of ineffectiveness. Those averments were that trial counsel should have objected to a jury instruction given by the trial court, that trial counsel improperly declined to make opening remarks to the jury, and that appellate counsel should have challenged the trial court's refusal to give a voluntary manslaughter instruction.

Counsel was thereafter appointed, and, on April 8, 2011, filed a "no-merit letter" in which counsel concluded that the May 22, 2008 petition was untimely. The letter indicated that counsel reviewed the entire record, interviewed Appellant, and interviewed prior counsel. Counsel observed that

Appellant's averments in both his first and amended PCRA petitions related solely to inadequate representation by trial counsel and that allegations of ineffective assistance of counsel do not overcome the time bar of 42 Pa.C.S. § 9545.

Counsel also noted that, to the extent that the April 8, 2011 article constituted newly discovered evidence, Appellant had failed to establish any specifics as to why his trial counsel's rate of pay actually affected the trial proceedings herein. Counsel filed a petition to withdraw. Appellant filed a *pro se* response to the no-merit letter in which he reasserted the claims presented in his *pro se* PCRA petitions. He also suggested that the review conducted by PCRA counsel was inadequate and that counsel should not be permitted to withdraw from representation.

On June 17, 2011, without disseminating notice of its intent to do so, the PCRA court dismissed the PCRA petition without an evidentiary hearing. It did not rule on counsel's pending motion to withdraw. Appellant, proceeding *pro se*, filed the present appeal. We remanded for the trial court to rule on the pending motion to withdraw. The PCRA court thereafter granted PCRA counsel's petition to withdraw and also appointed appellate counsel for purposes of this appeal. Newly-appointed counsel thereafter filed a brief containing the following arguments:

Did the trial court err in dismissing Appellant's PCRA challenge as untimely, given that all timeliness issues were the result of ineffective assistance of counsel which in this case constituted a structural failure and violation of assistance of

counsel under the Sixth Amendment to the United State Constitution and under the Pennsylvania Constitution?

Did the PCRA Court err in failing to consider objections to the Rule 907 Notice due to the PCRA court's failure to issue a Notice of Intent to Dismiss?

Did the PCRA court err in accepting the *Finley* letter submitted by PCRA counsel as reviewing the quarter session file, contacting petitioner and contacting former counsel does not constitute sufficient investigation in a case in which the individual has been sentenced to life without parole and is filing their first PCRA Petition?

Appellant's brief at 6.

The following standard of review applies herein. "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. 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." *Commonwealth v. Brandon*, 51 A.3d 231, 233 (Pa.Super. 2012) (citation and quotation marks omitted).

All PCRA petitions must be filed within one year after the defendant's judgment of sentence becomes final. 42 Pa.C.S. § 9545 (b)(1). In this case, Appellant's judgment of sentence was affirmed by this Court on June 30, 2003, and, since he sought no further review, it became final thirty days thereafter. 42 Pa.C.S. § 9545 (b)(3) ("For purposes of this subchapter, 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). Appellant thus had until June 30, 2004, to file a timely PCRA, and his May 22, 2008 PCRA petition is patently untimely.

“There are three exceptions to this [one-year] time requirement: (1) interference by government officials in the presentation of the claim; (2) newly discovered facts; and (3) an after-recognized constitutional right.” *Brandon, supra* at 233-34; 42 Pa.C.S. § 9545(b)(1)(i-iii). “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.” *Commonwealth v. Jones*, 54 A.3d 14, 17 (Pa. 2012); *accord Brandon, supra* at 234 (citing *Commonwealth v. Robinson*, 837 A.2d 1157, 1161 (Pa. 2003)) (“The timeliness requirements of the PCRA are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely petitions.”). “The PCRA squarely places upon the petitioner the burden of proving an untimely petition fits within one of the three exceptions.” *Jones, supra* at 17.

Appellant first invokes the newly-discovered facts exception to the PCRA. A PCRA petitioner can invoke the newly-discovered facts exception outlined in § 9545(b)(1)(ii) if he can establish that the facts upon which his claim is predicated were unknown to him and could not have been discovered through the exercise of due diligence. *Commonwealth v.*

**Bennett**, 930 A.2d 1264 (Pa. 2007); *see also Commonwealth v. Watts*, 23 A.3d 980 (Pa. 2011). “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.” **Commonwealth v. Monaco**, 996 A.2d 1076, 1080 (Pa.Super. 2010).

Appellant argues that he was prevented from filing a timely PCRA petition because trial counsel ignored his repeated requests to transmit his trial transcripts to him. Appellant suggests that he needed those documents to file a petition and that counsel’s obstinacy prevented him from timely pursuing PCRA relief and was tantamount to abandonment. He invokes **Bennett, supra**.

In **Bennett**, the defendant was convicted of first-degree murder and sentenced to life imprisonment, but no appeal was filed. The defendant filed a timely post-conviction petition, and the appeal from denial of PCRA relief was dismissed due to counsel’s failure to file a brief. The defendant filed another, untimely post-conviction petition seeking reinstatement of the post-conviction appeal. He argued that he was abandoned by counsel during the appeal and was unaware of the dismissal of the PCRA appeal. Our Supreme Court held that when a petitioner claims he was abandoned by counsel, he may successfully invoke section 9545(b)(1)(ii) if he can establish that the facts upon which his claim is predicated, *i.e.*, the outcome of the prior

proceedings, were unknown to him and could not have been discovered through the exercise of due diligence.

**Bennett** is inapplicable herein because Appellant admittedly was aware of the outcome of his direct appeal. Counsel's purported default in the present case consisted of a failure to send Appellant his transcripts. While Appellant suggests that he needed his transcripts to file a PCRA petition, this proposition cannot be sustained. Appellant needed no documents to file a PCRA petition. He readily could have filed a petition anytime after his judgment of sentence was affirmed. He was entitled to appointment of counsel for purposes of litigating his first PCRA, and counsel would have been, without restriction, permitted to file an amended PCRA petition after review of the record. Appellant's failure to receive his trial transcripts was not an impediment to filing a PCRA petition. Thus, Appellant's attempt to analogize his situation to that of the defendant in **Bennett** is misguided.

Appellant's attempt to fall within the parameters of the newly-discovered facts exception based upon the newspaper article likewise fails. The article suggests that court-appointed counsel are not sufficiently paid and do not perform adequately. The article arguably raised the possibility that Appellant received ineffective assistance of counsel. However, the case law uniformly provides that allegations of ineffective assistance of counsel do not fall within any exception to the time constraints of § 9545. As the court

held in *Commonwealth v. Gamboa–Taylor*, 753 A.2d 780, 783 (2000), a claim of ineffective assistance does not constitute a newly discovered fact, stating:

Appellant's attempt to interweave concepts of ineffective assistance of counsel and after-discovered evidence as a means of establishing jurisdiction is unconvincing. Although Appellant formulates his assertions here in terms of the discovery of new facts not previously known to him, it is readily apparent that Appellant's argument, at its essence, is a claim for ineffective assistance of PCRA counsel layered on top of trial counsel's ineffectiveness. This Court has stated previously that a claim for ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits. **See *Commonwealth v. Lark***, 560 Pa. 487, 746 A.2d 585, 589-90 (2000) (holding that couching argument in terms of ineffectiveness cannot save a petition that does not fall into exception to jurisdictional time bar).

***Id.*** at 785; **accord *Commonwealth v. Bronshtein***, 752 A.2d 868 (2000).

Additionally, claims relating to ineffectiveness of counsel do not qualify as governmental interference because 42 Pa.C.S. § 9545(b)(4) provides that defense counsel are not considered governmental officials. ***Commonwealth v. Abu-Jamal***, 833 A.2d 719, 725 (Pa. 2003). Thus: "It is well settled that allegations of ineffective assistance of counsel will not overcome the jurisdictional timeliness requirements of the PCRA." ***Commonwealth v. Wharton***, 886 A.2d 1120, 1127 (Pa. 2005); **see also *Commonwealth v. Pursell***, 749 A.2d 911 (Pa. 2000); ***Commonwealth v. Lark***, 746 A.2d 585 (Pa. 2000). Essentially, all of Appellant's allegations presented in both of his PCRA petitions relate to allegations of ineffective



assistance of counsel. Thus, he has failed to overcome the time bar outlined in § 9545.

In light of the fact that Appellant's 2008 petition is untimely, we conclude that the PCRA court's failure to disseminate a Pa.R.Crim.P. 907 notice does not warrant reversal. When a PCRA petition is untimely filed, our Supreme Court has specifically ruled that it is harmless error for the PCRA court to fail to transmit advance notice of its intent to dismiss a PCRA petition without a hearing. *Commonwealth v. Pursell, supra* at 916 n.7. Therein, our Supreme Court considered the propriety of the dismissal of an untimely PCRA petition filed in a capital case where the PCRA court failed to provide notice of its intent to dismiss the petition without a hearing as required by Pa.R.Crim.P. 1509 (now Rule 909). Rule 909 contains provisions identical to that of Pa.R.Crim.P. 907 regarding notice of intent to dismiss a PCRA petition without a hearing.

The Supreme Court in *Pursell* specifically recognized the merit in the defendant's allegation that the PCRA court's failure to notify the defendant of its intent to dismiss the petition without a hearing violated then-Rule 1509. Nevertheless, it ruled that "we will not provide Appellant with relief on this issue as our independent review has determined that Appellant failed to invoke the jurisdiction of the trial court by failing to plead and prove the applicability of the timeliness exceptions contained" in the PCRA. *Id.* Hence, Appellant's second allegation on appeal affords him no relief.

Finally, we reject Appellant's final position, that PCRA counsel should not have been permitted to withdraw because she failed to conduct the required review. *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super. 1988), outline the steps a PCRA counsel must take to be permitted to withdraw. "The holdings of those cases mandate an independent review of the record by competent counsel . . . The necessary independent review requires counsel to file a 'no-merit' letter detailing the nature and extent of his review and list each issue the petitioner wishes to have examined, explaining why those issues are meritless." *Commonwealth v. Rykard*, 55 A.3d 1177, 1184 (Pa.Super. 2012).

In the present case, counsel represented in the "no merit letter" that she "reviewed the Quarter Sessions file. Additionally, I contacted the Petitioner, and Petitioner's former counsel for information." Letter, 4/8/11, at 11. Thus, counsel reviewed the record, as required by *Turner/Finley*. Counsel also consulted with Appellant and his former counsel. Appellant points to no other action that PCRA counsel could have done that would have revealed any pertinent information. The review conducted was adequate. In the letter, counsel exhaustively detailed the evidence and procedural history. Additionally, she outlined all of the allegations that Appellant presented in both petitions, noted that the petitions were untimely, and established why the allegations did not overcome the time bar contained in

§ 9545. *Id.* at 4-5. Hence, counsel fulfilled the mandates of *Turner/Finley*.

Finally, we must address a pending application for relief filed by Appellant with this Court on March 9, 2012. In the petition, he seeks information from his record so he can file a brief. However, after March 9, 2012, Appellant was appointed new counsel for purposes of litigating this appeal, and counsel filed an advocate's brief herein. Appellant is not entitled to hybrid representation, *Commonwealth v. Jette*, 23 A.3d 1032 (Pa. 2011), cannot file a brief, and has no need of the requested materials. Hence, we deny the petition.

The March 9, 2012 Application for Relief filed by Michael Boyd is denied. Order affirmed.