

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
PETER J. COOK,	:	
	:	
Appellant	:	No. 1856 EDA 2012

Appeal from the PCRA Order June 11, 2012
 In the Court of Common Pleas of Philadelphia County
 Criminal Division No(s): CP-51-CR-0405151-2004
 CP-51-CR-0405161-2004
 CP-51-CR-0406071-2004
 CP-51-CR-0406091-2004

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED MAY 03, 2013

Pro se Appellant, Peter J. Cook, appeals from the order entered in the Philadelphia County Court of Common Pleas dismissing his second petition under the Post-Conviction Relief Act¹ (“PCRA”). Appellant asserts that the PCRA court erred in dismissing his petition as untimely because his claims fell within the after discovered evidence exception.² We affirm.

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541–9546.

² 42 Pa.C.S. § 9545(b)(1)(ii).

On April 24, 2006, Appellant was convicted of, *inter aila*, first-degree murder.³ That same day, Appellant was sentenced to, *inter alia*, life imprisonment. Post-sentence motions were filed and denied by the trial court. On December 28, 2007, this Court affirmed the judgment of sentence. ***Commonwealth v. Cook***, No. 1388 EDA 2006 (unpublished memorandum) (Pa. Super. filed Dec. 28, 2007). Appellant did not seek review with the Pennsylvania Supreme Court.

Appellant filed a timely first PCRA petition on July 11, 2008, “complaining of more than fifteen instances of alleged trial counsel ineffectiveness.” PCRA Ct. Op., 8/31/12, at 2. On April 13, 2011, the PCRA court denied Appellant’s petition and Appellant timely appealed. In his appellate brief, Appellant attached an affidavit, dated November 16, 2010, from a potential alibi witness, Rhonda Marshall, and alleged that trial counsel was ineffective for failing to call this witness. ***Commonwealth v. Cook***, No. 1188 EDA 2010 (unpublished memoranda) (Pa. Super. filed June 23, 2011). On June 23, 2011, this Court determined that Appellant waived the ineffectiveness claim because he did not raise it before the PCRA court. ***Id.***

On July 27, 2011, Appellant, *pro se*, filed the instant second PCRA petition asserting a claim of actual innocence and complaining of trial counsel’s ineffectiveness. Appellant attached affidavits from potential alibi

³ 18 Pa.C.S. § 2502.

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witnesses Rhonda Marshall, his niece, and Tara Rosalind Cook, his sister.

Ms. Marshall's affidavit stated in pertinent part:

On November 12, 2003, I Rhonda Marshall had went with my brother Robert Cook to our Grandmother's house. We got there at 4:00 PM my Uncle[, Appellant,]was in the house with his family. My uncle started to cut Robert's hair. When my uncle was done he went out of the house at 8:00 PM, he did come right back to his mother's house at 10:00 PM he told us he saw [C]harlene.

Appellant's Mot. for Post Conviction Relief, 7/27/11, at Ex. G.

Ms. Cook's affidavit stated in pertinent part:

[M]e and my daughters went to present the affidavit of my Daughter Rhonda Marshall to the lawyer Barbara A. McDermott [Appellant's first PCRA counsel] and explained to her that we both were willing to testify for my brother because, I told her that the police lied to me I now believe my brother is innocent I wanted to help my brother and because people were saying they were going to murder my brother I thought I was helping him, even the Police Officers said people are trying to take street justice on my brother that I'll do him more good to turn him in [T]he lawyer told us it was too late, but . . . my brother was telling us to testify.

Id. at Ex. G1.

On October 28, 2011, the PCRA court, pursuant to Pa.R.Crim.P. 907, issued a notice of its intent to deny Appellant's petition within twenty days because it was untimely and did not invoke a timeliness exception. On November 16, 2011, Appellant filed a motion for extension of time to respond the Rule 907 notice. The court did not rule on the motion. On November 21, 2011, Appellant filed a response to the Rule 907 notice that repeated his claims of actual innocence and ineffectiveness of trial counsel.

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On June 11, 2012, the PCRA court dismissed Appellant's second petition as untimely for failure "to properly invoke the after-discovered evidence exception to the PCRA timeliness requirements by indicating that the facts asserted were previously unknown to him and could not have been ascertained by the exercise of due diligence." PCRA Ct. Op. at 5. On July 2, 2012, Appellant filed a timely notice of appeal. The PCRA court did not order the filing of a statement of errors pursuant to Pa.R.A.P. 1925(b).

Appellant makes four arguments in support of his claim that his second PCRA petition is timely. First, as he did in his second PCRA petition, Appellant suggests "claims of actual innocence are never time barred or procedurally barred," relying on ***Burrell v. United States***, 384 F.3d 22 (2d Cir. 2004). Appellant's Brief 4, 12; **see** Appellant's Mot. for Post Conviction Relief at 7-F (capitalization omitted). Second, as he did in his second PCRA petition, Appellant contends that affidavits from alibi witnesses, his sister and niece, qualify as "newly discovered evidence." Appellant's Brief at 4, 12; **see** Appellant's Mot. for Post Conviction Relief at 3-C. As to the affiants' proposed testimony, Appellant argues

the after discovered evidence of two exculpatory affidavits, from Rhonda Marshall [A]ppellant's niece and Tara Rosalind Cook [A]ppellant's sister who would testify that [A]ppellant was in another location at the time of the crime, and because of the police lying to Ms. Cook caused her to become distraught and unable to face [A]ppellant because she turned him in to police to protect him from being shot or killed by the victim's family and friends.

Appellant's Brief at 4-5.

Appellant makes the following additional arguments:

[T]he failure to raise the claim previously was the result of interference by government officials with the presentation of the claim when the trial and PCRA court's allowed both trial counsel[,] and both PCRA counsel's to breach [A]ppellant's appellate rights, and his collateral rights to effective assistance of counsel [for] . . . failing to provide him with copies of discoveries

Id. at 6. Finally, he asserts "the rights asserted are constitutional rights 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 retroactively upheld." **Id.**

This Court has stated:

Our standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.

Before addressing the issues presented on appeal, we must determine whether Appellant's instant PCRA petition was timely filed. Our Supreme Court has stressed that [t]he PCRA's timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed. It is well settled that [a]ny and all PCRA petitions must be filed within one year of the date on which the petitioner's judgment became final, unless one of three statutory exceptions applies. 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.

Commonwealth v. Garcia, 23 A.3d 1059, 1061-62 (Pa. Super. 2011) (footnote, citations and quotation marks omitted), *appeal denied*, 38 A.3d 823 (Pa. 2012).

The PCRA 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. § 9545(b)(1)(i)-(iii).

“The petitioner bears the burden to allege and prove [that] one of the timeliness exceptions applies. A PCRA petition invoking one of these statutory exceptions must be filed within 60 days of the date the claims could have been presented.” ***Garcia***, 23 A.3d at 1062-63 (citations and quotations omitted); **see also** 42 Pa.C.S. § 9545(b)(2).

“Subsection (b)(1)(ii) has two components, which must be alleged and proved. Namely, the petitioner must establish that: 1) the **facts** upon which the claim was predicated were **unknown** and 2) could not have been ascertained by the exercise of **due diligence.**” *Commonwealth v. Bennett*, 930 A.2d 1264, 1272 (Pa. 2007) (quotations omitted). “**The focus of the exception is on [the] newly discovered facts, not on a newly discovered or newly willing source for previously known facts.**” *Commonwealth v. Marshall*, 947 A.2d 714, 720 (Pa. 2008) (citations omitted) (emphasis added).

On December 28, 2007, this Court affirmed Appellant’s judgment of sentence. Appellant had thirty days to seek allowance of appeal with the Pennsylvania Supreme Court, but he did not. **See** Pa.R.A.P. 1113(a). Thus, for PCRA purposes, Appellant’s judgment of sentence became final on Monday, January 28, 2008.⁴ The general one-year deadline expired on January 28, 2009. **See** 42 Pa.C.S. § 9545(b)(1). Therefore, because Appellant’s petition was filed on July 27, 2011, Appellant must establish that one of the exceptions to the one year time bar applies. **See** 42 Pa.C.S. § 9545(b); *Garcia*, 23 A.3d at 1062-63.

⁴ Since the thirtieth day fell on a Sunday, the filing period expired on Monday. **See** 1 Pa.C.S. § 1908. Also, we observe that the PCRA court incorrectly stated, “The judgment of sentence became final [on] July 23, 2011, thirty days after the dismissal of [A]ppellant’s first petition was affirmed by the Superior Court.” PCRA Ct. Op. at 4.

We agree with the PCRA court that Appellant did not plead a timeliness exception. Appellant's affiants merely alleged that they were with him during the commission of the crime. This is not a new "fact" that could not have been ascertained by the exercise of due diligence. **See Bennett**, 930 A.2d at 1270. Rather, the affiants were "**newly willing source[s] for previously known facts.**" **See Marshall**, 947 A.2d at 720 (emphasis added); **cf. Commonwealth v. Kellam**, 719 A.2d 792, 799 (Pa. Super. 1998) (holding, on direct appeal, that after-discovered evidence in form of alibi testimony from witnesses who would testify they were with defendant on weekend victim died is not truly after-discovered evidence in that defendant obviously knew about witnesses prior to trial).

Appellant's reliance on **Burrell** provides no basis for an exception to the PCRA time bar. **Burrell** related to a claim of actual innocence on federal *habeas* review. **Burrell**, 384 F.3d 22. The instant matter is before the Pennsylvania courts on collateral review. Thus, **Burrell** provides no basis for an exception to the PCRA time bar.⁵

Appellant's remaining arguments, concerning the government official-interference and newly-recognized constitutional right exceptions, were not raised in his second PCRA petition or his response to the PCRA court's Rule

⁵ Furthermore, **Burrell** is a non-binding federal court decision. **See NASDAQ OMX PHLX, Inc. v. PennMont Secs.**, 52 A.3d 296, 303 (Pa. Super. 2012).

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907 notice. As such, these claims are waived. **See** Pa.R.A.P. 302(a) (providing that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.”); **see also Commonwealth v. Washington**, 927 A.2d 586, 601 (Pa. 2007) (“Any claim not raised in the PCRA petition is waived and not cognizable on appeal.”). Having discerned no error of law, we affirm the order below. **See Garcia**, 23 A.3d 1061-62.

Order affirmed.

Judgment Entered.

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

Prothonotary

Date: 5/3/2013