

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MARVIN D. LEWIS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1955 WDA 2012

Appeal from the Order November 20, 2012
In the Court of Common Pleas of Erie County
Criminal Division at No.: CP-25-CR-0002751-1995

BEFORE: SHOGAN, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

FILED: May 29, 2013

Appellant, Marvin D. Lewis, appeals from the order dismissing his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, as untimely. We affirm.

On August 30, 2000, Appellant pleaded guilty to carrying a firearm without a license. In exchange, the Commonwealth *nolle prossed* the two remaining charges of terroristic threats and harassment. The charges related to an incident in which Appellant, while in his vehicle, got into an argument with another motorist and displayed a pistol to him. On September 26, 2000, the court sentenced Appellant to a term of incarceration of no less than thirty nor more than sixty months, plus fines

* Retired Senior Judge assigned to the Superior Court.

and costs.¹ On October 5, 2000, Appellant filed a counseled post-sentence motion seeking only to have his sentence “modified to one within the standard range[.]” (Motion to Modify, 10/05/00, at unnumbered page 2). The court granted the motion and reduced his minimum sentence from thirty to eighteen months. Appellant filed a *pro se* notice of appeal of the modified judgment of sentence.² On March 12, 2001, this Court dismissed the appeal for Appellant’s failure to file a brief. (***See Commonwealth v. Lewis***, No. 1943 WDA 2000, *Per Curiam* Order (Pa. Super. filed March 12, 2001)). Appellant did not seek review in our Supreme Court.

On September 4, 2012, Appellant filed a *pro se* writ of habeas corpus, which the PCRA court treated as a first PCRA petition. The court appointed counsel who filed a supplement to the petition on October 8, 2012. On October 23, 2012, the PCRA court sent Appellant a Rule 907³ notice of its intention to dismiss the petition without a hearing on the basis of untimeliness and Appellant’s failure to plead and prove an exception to the

¹ Based on our review of the record, it appears that Appellant still is incarcerated. His sentence was to be served consecutive to those he was serving on federal and state convictions in North Carolina.

² Thereafter, Appellant filed a *pro se* second motion to modify his sentence, which the court dismissed due to the pending appeal.

³ **See** Pa.R.Crim.P. 907(1).

PCRA time-bar. Appellant did not respond and, on November 20, 2012, the court dismissed Appellant's petition. Appellant timely appealed.⁴

Appellant raises one question for our review: "Whether the [PCRA] court erred in finding that the Appellant had not stated a colorable basis for application of an exception to the timeliness provision for the filing of a PCRA petition?" (Appellant's Brief, at 2). Specifically, Appellant asserts that, due to governmental interference, he was not notified that this Court dismissed his appeal on the basis of the failure to file a brief. (***See id.*** at 5-6).

Our standard of review for an order denying PCRA relief is well-settled:

This Court's 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. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that a petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted).

Here, the PCRA court determined that Appellant's petition was untimely and that he did not properly plead an exception to the PCRA time-

⁴ Appellant filed a statement of errors complained of on appeal on December 7, 2012 and the court filed an opinion on December 14, 2012 in which it relied on its October 23, 2012 opinion and Rule 907(1) notice. ***See*** Pa.R.A.P. 1925.

bar. (**See** PCRA Court Opinion and Rule 907 Notice, 10/23/12, at 1-2). We agree.

It is well-settled that:

A PCRA petition, including a second or subsequent one, must be filed within one year of the date the petitioner's judgment of sentence became final, unless he pleads and proves one of the three exceptions outlined in 42 Pa.C.S.[A.] § 9545(b)(1). A judgment becomes final at the conclusion of direct review by [our Supreme] Court or the United States Supreme Court, or at the expiration of the time for seeking such review. 42 Pa.C.S.[A.] § 9545(b)(3). 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. The timeliness requirements apply to all PCRA petitions, regardless of the nature of the individual claims raised therein. The PCRA squarely places upon the petitioner the burden of proving an untimely petition fits within one of the three exceptions.

Commonwealth v. Jones, 54 A.3d 14, 16-17 (Pa. 2012) (case citations and footnote omitted).

In the case *sub judice*, Appellant concedes that his petition is untimely. (**See** Appellant's Brief, at 4). His judgment of sentence became final on April 11, 2001, which was thirty days after this Court dismissed Appellant's appeal of his modified judgment of sentence. **See** 42 Pa.C.S.A. § 9545(b)(3). Therefore, he had one year from that date to file a petition for collateral relief unless he pleaded and proved that an exception to the timeliness requirement applied. **See id.** at §§ 9545(b)(1)(i)-(iii). Hence, Appellant's current petition, filed on September 4, 2012, is untimely on its face unless he pleads and proves one of the statutory exceptions to the time-bar.

Section 9545 of the PCRA provides only three exceptions that allow for review of an untimely PCRA petition: (1) the petitioner's inability to raise a claim because of governmental interference; (2) the discovery of previously unknown facts that would have supported a claim; and (3) a newly-recognized constitutional right. **See id.** A PCRA petition invoking one of these statutory exceptions must "be filed within 60 days of the date the claim could have been presented." **Id.** at § 9545(b)(2).

Here, Appellant attempts to argue that the governmental interference exception to the PCRA time-bar applies to this case. (**See** Appellant's Brief, at 5-6). Specifically, he alleges that counsel was ineffective when he failed to file a brief in Appellant's direct appeal and that "neither defense counsel, . . . the Superior Court of Pennsylvania or [the trial court] ever afforded hi[m] with notice as to the final adjudication of his appeal," therefore making the governmental interference exception applicable. (**Id.** at 5). We disagree.

Preliminarily, we note that the argument section of Appellant's brief fails to provide pertinent citation to relevant authority or discussion in support of his assertion that the governmental interference exception of the PCRA applies to this case. (**See id.** at 4-7); **see also** Pa.R.A.P. 2119(a)-(b). Instead, Appellant makes bald assertions such as "given the absence of due notice from any governmental entity, he should not be charged with notice" without further pertinent discussion or explanation. (Appellant's Brief, at 5). Accordingly, Appellant's argument that his petition is timely pursuant to

Section 9545(b)(1)(i) is waived. **See** Pa.R.A.P. 2101, 2119(a)-(b); **see also** ***Commonwealth v. Mitchell***, 883 A.2d 1096, 1108 (Pa. Super. 2005), *appeal denied*, 897 A.2d 454 (Pa. 2006) (waiving issues where appellant failed to cite pertinent legal authority or meaningfully develop claims). Moreover, it is without merit.

To establish “the governmental interference exception, the petitioner must plead and prove that the failure to previously raise [his PCRA] claims was the result of interference by government officials, and that the information could not have been obtained earlier with the exercise of due diligence.” ***Commonwealth v. Hawkins***, 953 A.2d 1248, 1253 (Pa. 2008), *cert. denied*, 558 U.S. 836 (2009) (citation omitted); **see also** 42 Pa.C.S.A. § 9545(b)(1)(i).

Appellant first claims that counsel’s failure to file an appellate brief and to advise him that this Court dismissed his direct appeal create “a credible basis to find governmental interference[.]” (Appellant’s Brief, at 6). We disagree.

It is well-settled that “the term ‘government officials’ does not include defense counsel.” ***Commonwealth v. Pursell***, 749 A.2d 911, 916 (Pa. 2000) (citation omitted); **see also** 42 Pa.C.S.A. § 9545(b)(4). Therefore,

Appellant's claim regarding counsel would not be cognizable under the PCRA's governmental interference exception.⁵

Appellant also perfunctorily claims that this Court⁶ "[never] afforded hi[m] with notice as to the final adjudication of his appeal[.]" (Appellant's Brief, at 5). He states that, "as a matter of course," when this Court dismisses an appeal because of an appellant's failure to file a brief, we direct "counsel to apprise the appellant of the action and that the cause of the dismissal . . . was due to counsel's inaction . . . and that provision of [counsel's] notice must be certified to the Superior Court of Pennsylvania." (*Id.* at 6). Without any citation to supporting authority, Appellant concludes that, because counsel did not provide him with notice⁷ or certify that he had done so with this Court, our failure to inform him directly of our decision

⁵ Additionally, and importantly, Appellant filed a *pro se* appeal from a sentence that was modified in a manner consistent with his counseled request. (**See** Notice of Appeal, 10/23/00; **see also** Trial Court Order, 10/06/00). A review of our docket confirms that Appellant had no counsel of record in this Court. Therefore, even were counsel's actions a basis for governmental interference, he would not have received a briefing schedule or notice of the dismissal to be under a duty to apprise Appellant of it in the first place.

⁶ Although Appellant also refers to the trial court, he abandons any discussion of its alleged governmental interference. (**See** Appellant's Brief, at 5-6). Accordingly, we will restrict our discussion to Appellant's claim against this Court.

⁷ As discussed previously, counsel was not of record in this Court and would not have received notice of our disposition or been under a duty to inform Appellant of the dismissal.

satisfies the governmental interference exception to the PCRA's timeliness requirements. (**See id.**). Even assuming, *arguendo*, that this Court failed to notify Appellant directly that his appeal had been dismissed, this claim would not merit relief.

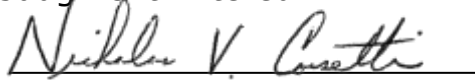
It is well-settled that information of public record cannot be considered unknown to an appellant. **See Commonwealth v. Lopez**, 51 A.3d 195, 196 (Pa. 2012) (concluding that PCRA petition was time-barred where "[i]nformation related to trial counsel's disciplinary issues was publicly available for years, . . . easily discoverable and in the public record for longer than 60 days before . . . petition was filed[.]"); **Commonwealth v. Chester**, 895 A.2d 520, 524 (Pa. 2006) (same). It is an appellant's burden to prove "that the information could not have been obtained earlier with the exercise of due diligence." **Hawkins, supra** at 1253; **see also** 42 Pa.C.S.A. § 9545(b)(1)(ii).

Here, this Court dismissed Appellant's appeal for his failure to file a brief on March 12, 2001. This dismissal was a matter of public record as of that date and became a part of the trial court's certified record in this matter on April 30, 2001. Appellant has utterly failed to argue or explain why this information could not have been discovered until now with the exercise of due diligence. Therefore, Appellant's argument regarding the applicability of the governmental interference exception must fail. **See Hawkins, supra** at 1253.

Accordingly, we conclude that, because Appellant failed to meet his burden of pleading and proving an exception to the PCRA timeliness requirements, the PCRA court did not err or abuse its discretion when it dismissed his petition as untimely. **See Jones, supra** at 16-17; **Carter, supra** at 682.

Order affirmed.

Judgment Entered.

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

Deputy Prothonotary

Date: May 29, 2013