

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KEVIN BUTLER,	:	
	:	
Appellant	:	No. 1956 EDA 2012

Appeal from the PCRA Order entered on September 19, 2011
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-0709031-1990

BEFORE: BOWES, GANTMAN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED MAY 28, 2013

Kevin Butler (“Butler”) appeals, *pro se*, from the Order dismissing his second Petition for relief filed pursuant to the Post Conviction Relief Act (“PCRA”). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In January 1992, following a jury trial, Butler was convicted of eight counts of robbery,¹ among several other offenses. The trial court sentenced Butler to an aggregate prison term of 40 to 80 years. Subsequently, this Court affirmed Butler’s judgment of sentence, after which the Supreme Court of Pennsylvania denied allowance of appeal. **See *Commonwealth v. Butler***, 630 A.2d 459 (Pa. Super. 1993) (unpublished memorandum), *appeal denied*, 634 A.2d 217 (Pa. 1993).

¹ Relevant to this appeal, one of Butler’s robbery convictions arose out of an armed robbery of a Pep Boys automotive store in Philadelphia on April 29, 1990.

In December 1993, Butler timely filed a *pro se* PCRA Petition. Following the PCRA court's dismissal of Butler's Petition, this Court affirmed. ***See Commonwealth v. Butler***, 742 A.2d 1141 (Pa. Super. 1999) (unpublished memorandum). Butler did not seek allowance of appeal with the Pennsylvania Supreme Court.

In April 2010, Butler filed his second *pro se* PCRA Petition, alleging a claim of newly discovered evidence. In response, the PCRA court gave Butler Notice of its intent to dismiss his Petition without a hearing. On September 19, 2011, the PCRA court dismissed Butler's Petition as untimely. Butler timely filed a *pro se* Notice of appeal.

On appeal, Butler raises the following issues for our review:

- A. Whether the PCRA[] court's dismissal of [Butler's] PCRA Petition is supported by the record or otherwise free from legal error[?]
- B. Whether [Butler's] PCRA Petition was filed timely or did [Butler] invoke an exception to the timeliness provision of the Post Conviction Relief Act[?]
- C. Whether [Butler's] after-discovered evidence satisfy [*sic*] the exception to the [PCRA's] one[-]year [time limitation?]
- D. Whether [Butler] satisfy [*sic*] the exception to filing newly discover[]ed evidence[?]

Brief for Appellant at 5 (capitalization omitted). We will address Butler's repetitive issues simultaneously.

Initially, we note that under the PCRA, any PCRA petition, "including a second or subsequent petition, shall be filed within one year of the date the

judgment becomes final[.]” 42 Pa.C.S.A. § 9545(b)(1). The 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. Albrecht**, 994 A.2d 1091, 1093 (Pa. 2010).

Here, Butler concedes that his PCRA Petition is facially untimely, as it was filed over fifteen years after his judgment of sentence became final. **See** Brief for Appellant at 9. However, according to Butler, he has met the requirements of the “newly discovered facts” exception to the PCRA’s one-year time bar. **See** 42 Pa.C.S.A. § 9545(b)(1)(ii) (providing that a PCRA petitioner may file a petition after the expiration of the one-year time bar if the petitioner can plead and prove that “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[.]”). “The focus of the exception is on the newly-discovered facts, not a newly discovered or newly willing source for previously known facts.” **Commonwealth v. Marshall**, 947 A.2d 714, 720 (Pa. 2008). Further, the “petitioner must explain why he could not have obtained the new fact(s) earlier with due diligence.” **Commonwealth v. Breakiron**, 781 A.2d 94, 98 (Pa. 2001). “Due diligence demands that the petitioner take reasonable steps to protect his own interests.” **Commonwealth v. Monaco**, 996 A.2d 1076, 1080 (Pa. Super. 2010). Additionally, any PCRA petition invoking one of the statutory exceptions to the PCRA’s time limitation must be filed within sixty days of

the date that the claim could have been presented. **See** 42 Pa.C.S.A. § 9545(b)(2).

In the instant case, Butler argues that he met the newly discovered evidence exception by submitting to the PCRA court a letter and affidavit from his brother, Nathaniel Butler (“Nathaniel”), wherein Nathaniel confessed that he was the perpetrator of the April 29, 1990 armed robbery of the Pep Boys store.² **See** Brief for Appellant at 16-18. Butler contends that he alleged this claim in his second PCRA Petition, filed on April 26, 2010, within sixty days of the date that he received Nathaniel’s confession affidavit, dated April 4, 2010, thus meeting the requirement of 42 Pa.C.S.A. § 9545(b)(2). Brief for Appellant at 18.

In its Opinion, the PCRA court addressed Butler’s claim, adeptly set forth the applicable law, and determined that Butler had failed to meet the requirements of the newly discovered evidence exception. **See** PCRA Court Opinion, 8/17/12, at 5-7. Our review discloses that the PCRA court’s sound rationale is supported by the record and the law, and we thus affirm on this basis. **See id.**

Since Butler’s second PCRA Petition is facially untimely and Butler has failed to meet his burden of proof with regard to the newly discovered

² Nathaniel, who is serving a life sentence for first-degree murder, did not accept responsibility for any of the other armed robberies of which Butler was convicted.

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evidence exception to the PCRA's time limitation, we conclude that the PCRA court properly dismissed Butler's untimely PCRA Petition without a hearing.

Order affirmed.

Judgment Entered.

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Prothonotary

Date: 5/28/2013

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

FILED
AUG 17 2012
Criminal Appeals Unit
First Judicial District of PA

COMMONWEALTH OF
PENNSYLVANIA,

APPELLEE

v.

KEVIN BUTLER,

APPELLANT

COURT OF COMMON PLEAS -
PHILADELPHIA COUNTY

CP-51-CR-0709031-1990

SUPERIOR COURT NO. 1956 EDA 2012

OPINION

A. PROCEDURAL HISTORY

The defendant and an unidentified co-conspirator committed a total of eight gunpoint robberies at Erol's Video Stores and Pep Boys Automotive Stores in Philadelphia during April of 1990. Following the Pep Boys robbery on April 29, 1990 at 48th and Girard Avenue in Philadelphia, the defendant and his co-conspirator fled in a white Cherokee Jeep which was later recovered. (N.T., 7/3/1992 at 388, 520-524). The white Cherokee Jeep was registered to the



defendant's girlfriend, with whom he resided at the time of this crime spree. *See id.* A Pep Boys employee followed the getaway vehicle after the robbery on April 29, 1990 and copied the license plate number. *See id.* at 309-349. When the police ran a search for the license plate number, they were able to locate the white Cherokee Jeep. *See id.* They arrested the defendant using the description of the robber that was given by the robbery victims. *See id.* Twelve victims from the eight robberies later identified the defendant as the perpetrator of the individual robberies.

A jury found the defendant guilty of eight counts of Robbery¹ as a felony of the first degree, five counts of Conspiracy², and six counts of Possessing an Instrument of Crime³ on January 3, 1992. After denial of post-verdict motions, the Honorable Angelo Guarino sentenced the defendant to forty (40) to eighty (80) years incarceration.

The defendant appealed the judgment of sentence which the Superior Court affirmed on April 23, 1993. *Commonwealth v. Butler*, 2746 Phl 1992 (Unpublished Memorandum Opinion filed April 23, 1993). On October 18, 1993, the Supreme Court denied defendant's Petition for Allowance of Appeal. *Commonwealth v. Butler*, 354 ED Allocator Docket 1993 (filed October 18, 1993). Defendant filed a petition under the Post-Conviction Relief Act (PCRA) on December 27, 1993 before the Honorable Genece Brinkley. The PCRA Court dismissed the petition on June 30, 1997. Defendant filed a notice of appeal and counsel petitioned to withdraw. The Superior Court granted counsel's petition and defendant elected to proceed *pro se*. *Commonwealth v. Butler*, 737 A. 2d 803 (Pa. Super. 1999). On July 20, 1999, the Superior

¹ 18 Pa. C.S. § 3701(a)(1)(i).

² 18 Pa. C.S. § 903.

³ 18 Pa. C.S. § 907.

Court affirmed the PCRA Court's dismissal of the petition. *Commonwealth v. Butler*, 742 A. 2d 1141 (Pa. Super. 1999).

On April 26, 2010, the defendant filed this second *pro se* PCRA petition. In his petition, he argues that new facts detailed in a letter from his brother confessing to the April 29, 1990 Pep Boys robbery exempts his petition from the one year PCRA time bar. *Defendant's PCRA Petition* at 3. In a letter dated March 27, 2010 and an affidavit dated April 4, 2010, defendant's brother, Nathaniel Butler states that for over twenty years, he has withheld that he is the person who committed the April 29, 1990 Pep Boys robbery. *Defendant's PCRA Petition Exhibits A and B*. Maintaining his innocence, the defendant requests that this Court hold an evidentiary hearing on the factual basis of his new claim. *Defendant's PCRA Petition* at 6. The Commonwealth filed a response to this petition on June 16, 2011. The defendant filed a reply on July 12, 2011.

Following a hearing on July 25, 2011, this Court filed a 907 Letter of Intent to Dismiss the PCRA petition because the issues raised in it were without merit, and the petition was untimely as the defendant did not invoke an exception to the PCRA timeliness provisions. On September 19, 2011, this Court formally dismissed the petition. On January 10, 2012, the defendant filed a Notice of Appeal *Nunc Pro Tunc* claiming he never received notice of the formal dismissal of his petition. This Court reinstated defendant's PCRA appellate rights on June 4, 2012. The defendant filed this Notice of Appeal on June 15, 2012.

B. DISCUSSION

This Court has jurisdiction over PCRA petitions that are filed within one year of the date the judgment becomes final. 42 Pa. C.S. § 9545(b)(1). As petitions filed beyond the one year period are considered untimely, this Court cannot exercise jurisdiction over the matter unless the petitioner can prove one of the statutory exceptions.⁴ *Id. See also Commonwealth v. Robinson*, 837 A.2d 1157, 1161 (Pa. 2003). Here, the defendant's judgment became final on January 18, 1994, ninety days after his petition for allowance of appeal was denied by the Pennsylvania Supreme Court. Therefore, defendant's PCRA petition filed on April 26, 2010 is untimely, as more than a year had passed from the date the judgment became final. Consequently, this Court cannot exercise jurisdiction over the petition unless the defendant is able to prove it meets one of the statutory exceptions to the one year time limit for PCRA's. 42 Pa. C.S. § 9545(b)(1).

The defendant asserts that his petition fulfills the second of these three exceptions, "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." 42 Pa. C.S. § 9545(b)(1)(ii). He states that even though he has always asserted that he was innocent of the robberies, he never thought his brother was the actual perpetrator of the robbery at Pep Boys on April 29, 1990. *Defendant's PCRA Petition* at 3. He filed this present petition on April 26, 2010, which was within 60 days of the date he received his brother's confession affidavit dated, April 4, 2010. Accordingly, the

⁴ 42 Pa. C.S. § 9545(b)(1) states: (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 the 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.

(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.

defendant submits that because he filed his petition within 60 days of discovering that his brother was the actual perpetrator of the Pep Boys robbery on April 29, 1990, this Court should find his petition timely under the exception stated in 42 Pa. C.S. § 9545(b)(1)(ii). *See id.*

The defendant is not entitled to relief from the PCRA one-year time bar under the “fact unknown” exception because the defendant could have ascertained this “fact” by the exercise of due diligence. *See* 42 Pa. C.S. § 9545(b)(1)(ii). A defendant cannot claim he has discovered new evidence simply because he had not been expressly told of that evidence. *Commonwealth v. Crawford*, 427 A.2d 166, 175 (Pa. Super. 1981). Likewise, a defendant who fails to question or investigate an obvious, available source of information cannot later claim evidence from that source constitutes newly discovered evidence. *Commonwealth v. Chambers*, 599 A.2d 630, 642 (Pa. 1991), *cert. denied*, 504 U.S. 946 (1992). When the new evidence comes from a person with whom the defendant had a close, amicable relationship, an assertion that this evidence or testimony could not previously be obtained should be especially scrutinized. *Commonwealth v. Padilla*, 997 A. 2d 356, 364 (Pa. Super. 2010) (finding that the defendant’s brother’s post-conviction confession to the crime could have been obtained before trial with due diligence when the brother lived with the defendant). *See also Commonwealth v. Johnson*, 863 A. 2d 423, 427 (Pa. 2004) (defendant could have discovered impeachment evidence about a Commonwealth witness with reasonable diligence considering the defendant had contact with the witness before trial).

Here, the defendant’s brother writes in his confession that he and his girlfriend were living with the defendant and defendant’s girlfriend in defendant’s girlfriend’s house when he (defendant’s brother) took the white Cherokee Jeep and robbed Pep Boys on April 29, 1990. *Defendant’s PCRA Petition Exhibit B*. He writes that defendant’s then girlfriend, the owner of

the white Cherokee Jeep, had asked him and his girlfriend to watch her two sons while she left the house for a short time. *See id.* Defendant's brother then took the keys to the Jeep, drove it to Pep Boys and committed the robbery at gunpoint, using the white Cherokee Jeep as the getaway car. *See id.*

Taking all this into account, the defendant maintains "he never thought of his brother being the perpetrator" of the Pep Boys robbery on April 29, 1990. Defendant lived with his girlfriend and his brother in the same residence at the time of the crime. *Defendant's PCRA Petition Exhibit B.* The defendant's brother had access to the keys of the white Cherokee Jeep on the day of the crime. *See id.* Knowing it was the white Cherokee Jeep owned by his girlfriend which was involved in the Pep Boys robbery, the defendant offers no reason why he did not further investigate his brother's connection to the crime. A defendant who fails to investigate obvious sources of testimony or evidence, especially when the source is a person with whom the defendant has a close relationship, cannot later claim that new information from such a source constitutes an unknown fact. *See Chambers*, 599 A.2d at 642; *Padilla*, 997 A. 2d at 364. *See also Commonwealth v. Abu-Jamal*, 941 A. 2d 1263, 1269 (Pa. 2008); *Commonwealth v. Johnson*, 863 A. 2d 423, 427 (Pa. 2004). Therefore, the defendant cannot now claim that his brother's confession constitutes a "fact unknown" when he previously failed to investigate this obvious source of information—someone who had access to the vehicle involved in the robbery—and when this source was his own brother with whom he was living with at the time of the crime.

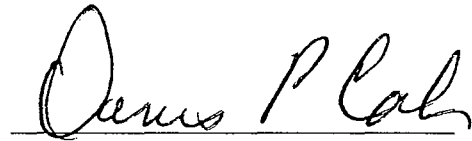
Accordingly, this Court finds that the defendant could have ascertained the information contained in his petition and his brother's affidavit with reasonable diligence prior to the filing of his petition in April of 2010. For this reason, we find that defendant's PCRA petition does not

satisfy the requirements of 42 Pa. C.S. § 9545(b)(1)(ii) and is untimely. This Court does not have jurisdiction over the untimely PCRA petition.

C. CONCLUSION

For the foregoing reasons, the decision of this Court should be affirmed.

BY THE COURT:

A handwritten signature in cursive script, reading "Denis P. Cohen", written over a horizontal line.

DENIS P. COHEN, J.

Dated: 8/17/12