

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROGER LEE THOMAS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2009 WDA 2012

Appeal from the PCRA Order November 27, 2012
In the Court of Common Pleas of Fayette County
Criminal Division at No.: CP-26-CR-0000058-2000

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

MEMORANDUM BY PLATT, J.

FILED: May 29, 2013

Appellant, Roger Lee Thomas, appeals *pro se* from the order dismissing his second petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, as untimely. We affirm.

On November 9, 2000, a jury convicted Appellant of two counts of corruption of minors, and one count each of aggravated indecent assault and indecent assault. The charges arose from incidents that took place from August of 1998 through September of 1999, involving five different victims. The court sentenced Appellant to an aggregate term of no less than fifty-four months nor more than one hundred and ninety-two months' incarceration. Appellant filed a timely post-sentence motion, which the court denied on

* Retired Senior Judge assigned to the Superior Court.

March 20, 2001. This Court affirmed Appellant's judgment of sentence on April 16, 2002 and our Supreme Court denied allowance of appeal on September 27, 2002. (**See Commonwealth v. Thomas**, 803 A.2d 798 (Pa. Super. 2002) (unpublished memorandum), *appeal denied*, 808 A.2d 571 (Pa. 2002)).

Appellant filed a *pro se* first PCRA petition on February 26, 2009. Appointed PCRA counsel moved to withdraw pursuant to **Turner/Finley**.¹ On January 4, 2010, the court granted counsel's motion and issued notice of its intent to dismiss Appellant's petition pursuant to Pennsylvania Rule of Criminal Procedure 907(1). **See** Pa.R.Crim.P. 907(1). Appellant responded *pro se* on January 25, 2010. The PCRA court formally dismissed the petition on July 9, 2010, on the basis of untimeliness and Appellant's failure to establish a timeliness exception. On September 16, 2010, this Court quashed Appellant's appeal as untimely and our Supreme Court denied Appellant's application to file a petition for allowance of appeal *nunc pro tunc* on January 26, 2011. (**See Commonwealth v. Thomas**, No. 1318 WDA 2010, at 1 (Pa. Super. filed Sept. 16, 2010), *appeal denied*, at No. 89 WM 2010 (Pa. filed Jan. 26, 2011)).

¹ **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

Appellant filed the instant, second PCRA petition *pro se* on June 15, 2012. The court again appointed the same PCRA counsel, who moved to withdraw because Appellant's petition lacked merit. On August 22, 2012, the court granted counsel's motion and, on August 31, 2012, served Appellant with a Rule 907(1) notice of its intention to dismiss the petition. Appellant filed a timely *pro se* response on September 24, 2012. The court again issued a Rule 907(1) notice on October 17, 2012, noting that the PCRA petition was untimely and that the issues raised therein and in Appellant's response to the August 31, 2012 notice lacked merit. Appellant again responded, and, on November 27, 2012, the court formally dismissed Appellant's PCRA petition as untimely. Appellant timely appealed.²

The argument section of Appellant's brief raises one issue for our review:³

² Appellant filed a timely statement of errors on appeal on December 28, 2012; the PCRA court filed a supplemental statement on January 8, 2013. **See** Pa.R.A.P. 1925.

³ Appellant's brief violates the requirements of the Pennsylvania Rules of Appellate Procedure on many grounds. For instance, the brief does not contain a statement of jurisdiction, a statement of both the scope and standard of review, a statement of the questions involved, a statement of the case, a summary of the argument, or a copy of the Rule 1925(b) statement. (**See** Appellant's Brief, at 1-5); **see also** Pa.R.A.P. 2111(a)(1), (3)-(6), (11). "This Court may quash or dismiss an appeal if the appellant fails to conform to the requirements set forth in the Pennsylvania Rules of Appellate Procedure." ***In re Ullman***, 995 A.2d 1207, 1211 (Pa. Super. 2010), *appeal denied*, 20 A.3d 489 (Pa. 2011) (citations omitted); **see also** Pa.R.A.P. 2101. However, because the argument section of Appellant's brief identifies an issue for our review, we decline to quash on this basis. **See** (*Footnote Continued Next Page*)

[Whether] the [trial c]ourt erred when it dismissed Appellant's [PCRA] petition without a hearing, and should have granted a hearing pursuant to [Pa.]R.A.P. []908, specifically in light of the criminal conviction of jailed trial attorney Mark F. Morrison, and the abandonment of appellate counsel Richard Bower and [PCRA] counsel Dianne Zerega[?]

(Appellant's Brief, at 1 (some capitalization omitted)).

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).

However, before considering Appellant's challenge, we first must determine whether his petition was timely, thus conferring us with jurisdiction to consider his claim on its merits.

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

(Footnote Continued) _____

Ullman, supra at 1212 (declining to quash where Appellant raised one cognizable issue).

judgment becomes final at the conclusion of direct review by this 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's judgment of sentence became final on December 26, 2002, which was ninety days⁴ after our Supreme Court denied his petition for allowance of appeal. **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 a timing exception applied. **See id.** at §§ 9545(b)(1)(i)-(iii). Hence, Appellant's current petition, filed on June 15, 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-

⁴ An appellant has ninety days to file a petition for writ of certiorari with the United States Supreme Court from the date of our Supreme Court's decision. **See** U.S. Sup. Ct.R. 13(1).

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, because Appellant utterly fails even to allege the applicability of a timeliness exception, he does not provide either pertinent citation to authority or argument regarding the time-bar. (**See** Appellant’s Brief, at 1-5); **see also** Pa.R.A.P. 2119(a)-(b).⁵ To the contrary, Appellant merely asserts that trial counsel was ineffective because of his alleged criminal conviction and that direct appeal counsel rendered ineffective assistance, effectively abandoning him and leaving him unable to file a timely PCRA petition, when he failed to notify Appellant that our Supreme Court denied his petition for allowance of appeal. (**See id.** at 1-5).

It is well-settled that “a claim for ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits.” **Commonwealth v. Gamboa-Taylor**, 753 A.2d 780, 785 (Pa. 2000) (citations omitted); **see also Commonwealth v. Lark**, 746 A.2d 585, 589

⁵ Appellant relies on only three cases in support of this petition, all of which are federal, and none of which are cited for the applicability of a PCRA timeliness exception. (**See** Appellant’s Brief, at 3-5). Therefore, not only are they not pertinent to the timeliness issue, the two Third Circuit cases would not be binding on this Court even if they did address the PCRA time-bar. (**See** Appellant’s Brief, at 3-5); **see also Cambria-Stoltz Ent. v. TNT Investments**, 747 A.2d 947, 952 (Pa. Super. 2000), *appeal denied*, 795 A.2d 970 (Pa. 2000) (noting that the Third Circuit’s interpretation of state law is not binding on this Court).

(Pa. 2000) (concluding that ineffectiveness of counsel claims were untimely where appellant did not assert that they fell within timeliness exception).

In the case before us, because Appellant merely alleges ineffective assistance of counsel and does not plead and prove that the claim falls within a PCRA timeliness exception, he has failed to save his untimely petition for review on the merits.⁶ (**See** Appellant's Brief, at 1-5); **see also** **Gamboa-Taylor, supra** at 785; **Lark, supra** at 589-90. Therefore, the PCRA court did not err in dismissing his petition on the bases of untimeliness

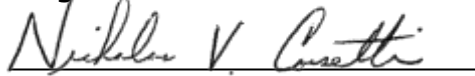
⁶ Moreover, we note that counsels' alleged ineffectiveness meets neither the governmental interference exception, nor the newly-discovered fact exception to the PCRA time-bar, because counsel is not a government official and Appellant failed to plead and prove that "that the information could not have 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), (4); **Commonwealth v. Pursell**, 749 A.2d 911, 916 (Pa. 2000) (noting that the governmental interference exception does not apply to the actions of counsel).

Also, the newly-recognized constitutional right exception would not apply. In his PCRA petition, Appellant relies on **Maples v. Thomas**, 132 S. Ct. 912 (2012) for the argument that he "cannot be charged with the acts or omissions of [his] attorney who . . . abandoned him . . . when he lacks reason to believe his attorney [is] no[t] representing him." (PCRA Petition, 6/15/12, at 7). Even when interpreted as an attempt to raise the newly recognized constitutional right exception, this argument would lack merit. The legal principle on which Appellant relies is not new and, in fact, the Supreme Court undergoes an exhaustive review of this principle's application in previous decisions. **See Maples, supra** at 923-24. Therefore, because the **Maples** Court did not create a new constitutional right, this argument would fail, even had Appellant presented it for our review.

and Appellant's failure to establish the applicability of an exception to the PCRA time-bar. **See Jones, supra** at 17; **Carter, supra** at 682.⁷

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

⁷ Because the PCRA court properly determined that it did not have jurisdiction to review this untimely petition, we do not need to reach the court's finding that, in addition to the timeliness issue, Appellant's claims were previously litigated or waived. (**See** PCRA Court Supplemental Statement, 1/08/13, at 1-2).