

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
DEMETRIUS FLEMING,		
Appellant		No. 127 WDA 2014

Appeal from the PCRA Order entered November 12, 2013,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0006863-2002,
CP-02-CR-0009253-2003, & CP-02-CR-200301179.

BEFORE: PANELLA, DONOHUE, and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.:

FILED MAY 07, 2014

Demetrius Fleming (“Appellant”) appeals *pro se* from the order denying his serial petition for post-conviction relief filed pursuant to the Post Conviction Relief Act (“PCRA”). 42 Pa.C.S.A. §§ 9541-46. We affirm.

The Commonwealth charged Appellant with various offenses, including criminal homicide, at three separate Informations. The pertinent procedural history regarding these charges has been summarized as follows:

On November 12, 2003, Appellant’s jury trial for criminal homicide began. The trials relating to the other charges were postponed pending the outcome of Appellant’s homicide trial. The following day, Appellant and the Commonwealth reached an open plea agreement that required Appellant to plead guilty to one count of third-degree murder. Appellant entered the required plea after an oral colloquy was conducted on the record. No agreement was reached regarding the minimum sentence except that a five year minimum was required because a firearm was used. Also, the trial court agreed to sentence

Appellant to concurrent sentences regarding the other two Informations. Sentencing was deferred so that a pre-sentence report could be ordered.

The trial court sentenced Appellant on February 3, 2004. Appellant was represented by counsel during the sentencing, although one of Appellant's attorneys was not present. Appellant made a brief statement apologizing to the victim's family and expressing remorse for his crimes. The trial court then sentenced Appellant to a term of not less than [216] months nor more than [480] months [of imprisonment for the third-degree murder conviction. The sentences imposed at the other two Informations were run concurrent with this sentence.]

On February 11, 2004, Appellant filed a timely post-trial motion requesting that his guilty plea be withdrawn, or, in the alternative, that his sentence be reconsidered. On July 2, 2004, the trial court held a hearing regarding that motion. On July 12, 2004, the trial court issued an Order denying Appellant's post-trial motion. Appellant filed a timely appeal to this Court on August 11, 2004.

Commonwealth v. Fleming, 905 A.2d 1042 (Pa. Super. 2006) (unpublished memorandum at 3-4, (footnote omitted), *appeal denied*, 911 A.2d 933 (Pa. 2006)). In this decision, we affirmed Appellant's judgment of sentence. Our Supreme Court denied Appellant's petition for allowance of appeal on November 21, 2006.

On April 18, 2007, Appellant filed a *pro se* PCRA petition, and counsel was appointed to represent him. Counsel filed an amended petition on August 13, 2008, in which Appellant asserted, *inter alia*, that trial counsel's promise of a specific sentence caused him to enter an invalid plea. Concluding that Appellant's claim was previously litigated in Appellant's direct appeal, the PCRA court, on August 25, 2008, provided Appellant notice

of intent to dismiss the petition pursuant to Pa.R.Crim.P. 907. Appellant filed a response to the PCRA court's Rule 907 notice on September 10, 2008. By order entered September 11, 2008, the PCRA court denied Appellant's PCRA petition. Although Appellant did not file a timely appeal of this decision, by order entered November 6, 2009, the PCRA court reinstated Appellant's appellate rights *nunc pro tunc*, and the PCRA court once again appointed counsel. Thereafter, Appellant filed a timely appeal to this Court.

In an unpublished memorandum filed on June 3, 2010, this Court rejected Appellant's claims of ineffectiveness of counsel involving the entry of his guilty plea, and affirmed the PCRA court's denial of post-conviction relief. ***Commonwealth v. Fleming***, 4 A.3d 674 (Pa. Super. 2010), *appeal denied*, 15 A.3d 489 (Pa. 2011). On February 16, 2011, our Supreme Court denied Appellant's petition for allowance of appeal. ***Id.***

On August 6, 2013, privately-retained counsel filed another PCRA petition on Appellant's behalf. On August 8, 2013, the Commonwealth filed its answer to Appellant's petition. On September 4, 2013, the PCRA court issued Pa.R.Crim.P. 907 notice of intent to dismiss Appellant's latest petition without a hearing because it was untimely. After considering Appellant's counseled response, the PCRA court denied Appellant's petition on November

12, 2013. This *pro se* appeal followed.¹ The PCRA court did not require Pa.R.A.P. 1925 compliance.

This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Halley***, 870 A.2d 795, 799 n.2 (Pa. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001). Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. ***Commonwealth v. Jordan***, 772 A.2d 1011 (Pa. Super. 2001). Because this is a serial petition for post-conviction relief, Appellant must meet a more stringent standard. "A second or any subsequent post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred." ***Commonwealth v. Burkhardt***, 833 A.2d 233, 236 (Pa. Super. 2003) (*en banc*) (citations omitted). "A petitioner makes a prima facie showing if he demonstrates that either the proceedings which

¹ By order entered January 29, 2014, privately-retained counsel was granted leave to withdraw his appearance.

resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged.” ***Id.***

Before addressing the issues Appellant presents on appeal, we must first consider whether the PCRA court properly determined that Appellant’s latest petition for post-conviction relief was untimely. The timeliness of a post-conviction petition is jurisdictional. ***Commonwealth v. Albrecht***, 994 A.2d 1091, 1093 (Pa. 2010) (citation omitted). Thus, if a PCRA petition is untimely, neither an appellate court nor the PCRA court has jurisdiction over the petition. ***Id.*** “Without jurisdiction, we simply do not have the legal authority to address the substantive claims” raised in an untimely petition. ***Id.***

Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, an exception to the time for filing the petition. ***Commonwealth v. Gamboa-Taylor***, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S.A. § 9545(b)(1). Under these exceptions, the petitioner must plead and prove that: “(1) there has been interference by government officials in the presentation of the claim; or (2) there exists after-discovered facts or evidence; or (3) a new constitutional right has been recognized.” ***Commonwealth v. Fowler***, 930 A.2d 586, 591 (Pa. Super. 2007) (citations omitted). A PCRA petition invoking one of these statutory exceptions must “be filed within sixty days of

the date the claim first could have been presented.” **Id.** at 783. **See also** 42 Pa.C.S.A. § 9545(b)(2). Moreover, exceptions to the time restrictions of the PCRA must be pled in the petition, and may not be raised for the first time on appeal. **Commonwealth v. Burton**, 936 A.2d 521, 525 (Pa. Super. 2007); **see also** Pa.R.A.P. 302(a) (“Issues not raised before the lower court are waived and cannot be raised for the first time on appeal.”).

For PCRA purposes, Appellant’s judgment of sentence became final on February 19, 2007, when the ninety-day period for filing a writ of certiorari with the United States Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3); U.S.Sup.Ct.R. 13. Therefore, Appellant had to file this PCRA petition on or about February 19, 2008, in order for it to be timely. As Appellant filed the instant petition on August 6, 2013, it is patently untimely unless he has satisfied his burden of pleading and proving that one of the enumerated exceptions applies. **See Commonwealth v. Beasley**, 741 A.2d 1258, 1261 (Pa. 1999).

Appellant has failed to plead and prove the applicability of any of the exceptions to the PCRA’s time restrictions. Within his latest PCRA petition, Appellant asserts that his recent discovery of affidavits from various witnesses rendered his latest petition timely under section 9545(b)(1)(ii). This exception requires 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.” 42 Pa.C.S.A. § 9545(b)(1)(ii).

The PCRA court rejected Appellant's claim, and reasoned as follows:

Although [Appellant] claims the late filing should be excused because these witnesses were only recently discovered, that is simply not true. The two "after-discovered" alibi witnesses, Anthony Porter and Lavelle Coles, were listed in the Notice of Alibi Defense filed by [Appellant] before trial. That notice establishes that [Appellant] knew the substance of their testimony at the time of his trial. Delores Housch, the victim's wife, was also clearly known to [Appellant]. He stated at the time that he was sentenced that he knew the victim and his family for years. [Appellant] apologized to them for killing the victim. Moreover, his attorney stated that she had spoken with the victim's wife and that Ms. Housch told her, ". . . that she wanted to testify for [Appellant], that she had known him for years. He has dated her daughter in the past and she truly loves him and wishes that none of this would have occurred." (N.T. Sentencing Hearing, 2/3/04; p. 6). Obviously, [Appellant] knew of the existence of this witness.

Finally, [Appellant] pleaded guilty; he did not proceed to trial. His choice to plead guilty resulted in the waiver of his right to present a defense; to require that the Commonwealth prove his guilt beyond a reasonable doubt. By pleading guilty, [Appellant] was waiving his right to present the alibi witnesses set forth in the notice, including Anthony Porter and Lavelle Coles. The only way that such waiver can be avoided is if [Appellant] was induced to plead guilty through counsel's ineffectiveness. Not only has [Appellant] not alleged that counsel was ineffective in this Petition, [but] even if he had, he could not prevail because this Court has twice determined that counsel was effective in connection with the plea; determinations that have affirmed on appeal.

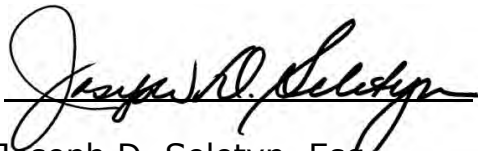
Memorandum Opinion and Notice of Intention to Dismiss, 9/4/13, at 4-5.²

Our review of the record readily supports the PCRA court's conclusion that Appellant knew of each of these witnesses prior to trial. Additionally, as stated by the PCRA court, because Appellant entered a valid guilty plea, any information belatedly offered by these witnesses would be irrelevant to a determination of Appellant's guilt.

In sum, Appellant's PCRA petition is facially untimely, and he has failed to meet his burden of proof with regard to any exception to the timeliness requirements of the PCRA. Thus, the PCRA court lacked jurisdiction to consider Appellant's substantive issues, and properly dismissed Appellant's latest petition for post-conviction relief.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/7/2014

² The PCRA court further concluded that Ms. Housch "would not have been able to offer any admissible testimony that would have helped" Appellant. **See id.**