

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CAINE SHEPPARD PELZER

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1445 MDA 2013

Appeal from the PCRA Order June 28, 2013  
In the Court of Common Pleas of Luzerne County  
Criminal Division at No(s): CP-40-CR-0001989-2001

BEFORE: GANTMAN, P.J., OTT, J., and MUSMANN, J.

MEMORANDUM BY OTT, J.:

**FILED JULY 14, 2014**

Caine Sheppard Pelzer appeals *pro se*<sup>1</sup> from the order entered on June 28, 2013, in the Court of Common Pleas of Luzerne County, denying his first petition filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, as untimely. Pelzer seeks relief from the judgment of sentence of an aggregate 22 to 44 years' imprisonment, imposed April 15, 2002, after a jury convicted him of 22 offenses relating to a home invasion that took place on February 17, 2001. On appeal, Pelzer raises a plethora of

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<sup>1</sup> On August 21, 2013, the court held a **Grazier** hearing. **Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998). On August 27, 2013, the court entered an order, granting Pelzer's request to proceed *pro se* and appointed Matthew P. Kelly, Esquire, as stand-by counsel.

claims relating to the denial of his PCRA petition. Based upon the following, we affirm.

A panel of this Court previously set forth the facts and procedural history as follows:

In March of 2002, [Pelzer] was convicted of multiple counts of robbery and related offenses and sentenced to an aggregate term of incarceration of twenty-two to forty-four years. He subsequently retained Demetrius W. Fannick, Esquire, to represent him in his appeal to this Court, in which he argued that he experienced ineffective assistance of trial counsel (IAC) as counsel failed to pursue [Pelzer]'s claim that he had an alibi defense. However, as [Pelzer]'s direct appeal was pending, our Supreme Court decided ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), in which it held that, "as a general rule, a petitioner should wait to raise claims of [IAC] until collateral review." ***Id.*** at 738. Pursuant to ***Grant***, we dismissed [Pelzer]'s claim on May 7, 2003, without prejudice to his right to seek relief under the PCRA. ***Commonwealth v. Pelzer***, No. 987 MDA 2002, unpublished memorandum (Pa. Super. filed May 7, 2003). As the IAC claim was the sole issue on appeal, we affirmed [Pelzer]'s judgment of sentence.

[Pelzer] did not petition for permission to appeal with the Pennsylvania Supreme Court and, therefore, his judgment of sentence became final on June 6, 2003.<sup>1</sup> Accordingly, [Pelzer], who was still represented by Attorney Fannick, had until June 6, 2004, to file a timely petition for post-conviction relief asserting his IAC claim. 42 Pa.C.S. § 9545(b)(1) (stating that "[a]ny petition..., including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final").

<sup>1</sup> **See** 42 Pa.C.S. § 9545(b)(3) (mandating that a judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review); Pa.R.A.P. 1113(a) (stating "a petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days of the entry of the order of the Superior Court sought to be reviewed").

Nevertheless, it was not until nearly five years later on April 1, 2008, that [Pelzer] filed a *pro se* PCRA petition. Counsel was appointed and an amended PCRA petition was subsequently filed in which [Pelzer] acknowledged that his petition was facially untimely, but contended that he met an exception to the PCRA timeliness requirements.<sup>2</sup> Specifically, [Pelzer] argued that he satisfied the exception of section 9545(b)(1)(ii), as elucidated by our Supreme Court in ***Commonwealth v. Bennett***, 930 A.2d 1264 (Pa. 2007), because he had been abandoned by Attorney Fannick, whom he believed was filing a PCRA petition on his behalf.<sup>3</sup> The PCRA court conducted [two] hearing[s] addressing whether [Pelzer]’s petition met this exception on April 9, 2009, and May 20, 2009. After receiving testimony from [Pelzer] and Attorney Fannick regarding why no petition for post-conviction relief had been filed, the PCRA court concluded that [Pelzer] failed to meet the exception set forth in section 9545(b)(1)(ii) and entered an order denying his petition. [Pelzer] filed a timely appeal from the court’s order [which was entered on May 20, 2009].<sup>4</sup>

<sup>2</sup> Those exceptions, set forth in section 9545(b)(1)(i)-(iii), state that a petition will be deemed timely if the petitioner pleads and proves any of the following:

(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).

<sup>3</sup> In ***Bennett***, our Supreme Court found that a petitioner’s claim that counsel abandoned him on appeal, if proven,

would fall within the plain language of the exception set forth in section 9545(b)(1)(ii). **Bennett**, 930 A.2d at 1272.

<sup>4</sup> [Pelzer] was still represented by his appointed PCRA counsel at the time he filed his notice of appeal with this Court. However, [Pelzer] subsequently filed a motion to proceed *pro se* which was granted by the PCRA court after a hearing.

**Commonwealth v. Pelzer**, 30 A.3d 540 [940 MDA 2009] (Pa. Super. 2011) (unpublished memorandum at 1-4).

While Pelzer's appeal was pending, on July 23, 2009, the PCRA court issued two orders: (1) the first directed the superintendent and mailroom supervisor of the State Correctional Institution ("SCI") at Greene to produce for Pelzer the legal mail log for the date of **April 7, 2004**; and (2) the second directed the superintendent and mailroom supervisor of the SCI at Fayette to produce for Pelzer the legal mail log for the date of **August 22, 2007**.<sup>2</sup>

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<sup>2</sup> At the May 20, 2009 PCRA evidentiary hearing, Fannick produced a copy of a letter, dated **April 7, 2004**, in which he advised Pelzer that his time within which to file a petition was running out, and that if Pelzer wanted to proceed with filing a petition, he had to provide Fannick with the telephone records confirming his alibi. **See** N.T., 5/20/2009, at 32-33.

Fannick testified that after April 7, 2004, several years passed with no communication between counsel and Pelzer. Fannick stated that after sending a letter to Pelzer on June 26, 2006, he did not intend on filing an appeal because he still did not have the information necessary to do so. **Id.** at 53. Subsequently, in 2007, Fannick received a document labeled as a PCRA petition from Pelzer. In response, on August 10, 2007, Fannick sent Pelzer a letter, in which he stated:  
(Footnote Continued Next Page)

Subsequently, on May 18, 2011, a panel of this Court remanded the matter, stating:

[I]n light of the PCRA court's orders [entered on July 23, 2009] directing the legal mail logs to be produced for [Pelzer], and because it seems from the record that the PCRA court based its determination of untimeliness at least in part on its belief that [Pelzer] received the April 7, 2004 and August 22, 2007 letters [from Fannick], we vacate the PCRA court's order dismissing

*(Footnote Continued)* \_\_\_\_\_

I will contact your institution to arrange a telephone conference to further discuss the filing.... I have reviewed the PCRA petition which you forwarded to my office. Quite honestly, I'm impressed by your effort. Of course, since you are not an attorney, there are some things I will fine tune before the document is filed.

***Id.*** at 21. Fannick sent a follow-up letter, dated **August 22, 2007**, which read:

I reviewed the material that you sent me. Although well done, you still will have a timeliness problem. You've been advised before that a PCRA petition must be filed within one year of the last order entered. In your case, that was May, 2003. While there are limited exceptions to this Rule, I do not believe you will fall within any of them.

***Id.*** at 22.

The PCRA court issued a Pa.R.A.P. 1925 opinion on February 11, 2010, finding:

It is patently clear from even a cursory examination of the transcript that [the PCRA court] accepted and credited Attorney Fannick's testimony and explanation regarding the lack of filing a petition in the instant matter. Simply stated, the record does not permit nor support the conclusion that Attorney Fannick abandoned Mr. Pelzer.

PCRA Court Opinion, 2/11/2010, at 4-5.

[Pelzer]'s petition and remand for the court to reevaluate [Pelzer]'s petition in light of the new evidence of these legal mail logs and affidavits.

**Pelzer**, 30 A.3d 540 [940 MDA 2009] (Pa. Super. 2011) (unpublished memorandum at 9-10).

On remand, the PCRA court held an evidentiary hearing on November 28, 2011. At that time, the affidavits of Mailroom Supervisors, Dean Geehring, State Correctional Institution ("SCI") Greene, and H. Darlene Linderman, SCI Fayette, were entered into the record. After numerous continuance requests by both standby counsel for Pelzer and the Commonwealth, a second evidentiary hearing was held on February 28, 2013. At that hearing, Pelzer testified, and he presented the testimony of Geehring and Linderman. The Commonwealth called Fannick to testify. On June 28, 2013, the PCRA court entered an order and opinion, denying Pelzer's petition. It also adopted and reinstated its May 20, 2009 order, which initially denied PCRA relief. This timely *pro se* appeal followed.<sup>3</sup>

As stated above, Pelzer raises 14 claims on appeal. **See** Pelzer's Brief at 3-4. Based on the nature of Pelzer's claims and the PCRA court's finding

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<sup>3</sup> On July 26, 2013, Pelzer filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On September 6, 2013, the PCRA court entered an order adopting its May 20, 2009 order, February 11, 2010 order and opinion, and June 28, 2013 order and opinion pursuant to Pa.R.A.P. 1925(a).

that his petition was untimely, we will concentrate on his first issue, which is as follows:

1. Whether [Pelzer] is entitled to reinstatement of his Post Conviction Relief Act ('PCRA') appeal rights *nunc pro tunc* in his first petition filed more than one year after the date [in which] his judgment of sentence became final due to ('PCRA') counsel's failure to file a PCRA petition and "abandonment" of the prior appeal?

Pelzer's Brief at 3.

Pelzer does not deny that his PCRA petition was patently untimely. Rather, Pelzer contends this Court should reinstate his PCRA rights because his counsel, Fannick, abandoned him, and "the record reflects there was absolutely no way for [him] to ever suspect any need to act on his own behalf with positive communications to and from [Fannick] over the course of roughly five years." *Id.* at 8. Additionally, Pelzer states Fannick "promised" to file a PCRA petition but failed to do so. *Id.* at 13. Pelzer claims he did not receive the April 4, 2004 and August 22, 2007, letters and therefore, was never informed of the timeliness requirement. *Id.* at 14. Moreover, he states, "The PCRA Court has widely ignored every other letter of record showing Mr. Pelzer was misled and prevented from acting on his own because he lacked knowledge to do so." *Id.* at 15. Consequently, Pelzer asserts he exercised due diligence in pursuing his claims, and filed his petition within 60 days of receiving his trial transcripts and notice of Fannick's "abandonment" in March of 2008. *Id.* at 16, 19.

With respect to the denial of a PCRA petition, our standard of review is well-settled:

[T]his Court's standard of review regarding an order denying 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. Ragan**, 592 Pa. 217, 923 A.2d 1169, 1170 (2007). 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).

**Commonwealth v. Davis**, 86 A.3d 883, 886 (Pa. Super. 2014).

As indicated above, under the PCRA, any petition must be filed within one year of the date the petitioner's judgment of sentence becomes final, unless a petitioner pleads and proves that one of the statutory exceptions to the timeliness requirement is applicable. 42 Pa.C.S. 9545(b)(1). Pursuant to Section 9545, an otherwise untimely petition is not time-barred if a petitioner can plead and prove that, *inter alia*,

(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[.]

42 Pa.C.S. § 9545(b)(1)(ii). Moreover, the exception must be pled within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).<sup>4</sup> "Our Supreme Court has stressed that '[t]he PCRA's timeliness

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<sup>4</sup> "[T]he 60-day rule requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence." **Commonwealth v. Stokes**, 959 A.2d 306, 310 (Pa. 2008) (citation omitted).



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.” ***Commonwealth v. Garcia***, 23 A.3d 1059, 1061 (Pa. Super. 2011) (footnote omitted) (citation omitted).

Here, the trial court made the following findings of fact based on the testimony presented at the February 28, 2013, PCRA evidentiary hearing:

**(i) Testimony of H. Darlene Linderman**

H. Darlene Linderman testified that she worked as a mailroom supervisor for 25 years and that she has been at SCI Fayette for the past nine years.

SCI Fayette maintains legal mail logs for inmates. Currently they keep a legal mail log on a computer and each housing unit maintains a legal mail log. However in 2007, they only had a paper mail log, individual papers were filled out for each legal letter that came in and they were sent down to the housing unit with the letter.

Ms. Linderman testified that the function of the mail log is to have verification if an inmate questions if they received any legal mail.

According to Ms. Linderman, SCI Fayette has no record of [Pelzer] receiving any legal mail for the month of August of 2007.

On cross-examination, Ms. Linderman acknowledged that in 2007 that SCI Fayette did not maintain a single unified mail log and that it is possible that legal mail could have gotten through. Even with the best of training, Ms. Linderman acknowledged that mistakes are made and notations are not made that legal mail was received.

**(ii) Testimony of Dean Geehring**

Dean Geehring also testified. Mr. Geehring is the corrections mail inspector supervisor for the Pennsylvania

Department of Corrections, SCI Green and has worked for the Department of Corrections for over twenty-two (22) years.

Mr. Geehring attested that SCI Green maintains a legal mail log for inmates and he is responsible for safekeeping of the logs. The log reflects when privileged mail is delivered to inmates. The witness testified that there were no legal mail references to [Pelzer] for April 7, 2004[,] and noted the only mail reference for [Pelzer] was in August of 2002. He further testified that in 2004, it was possible that legal mail was delivered to [Pelzer] but it was never registered in the mail log.

Despite there being numerous mailings by Attorney Fannick to [Pelzer] in addition to the mail reference in August of 2002, Mr. Geehring has no documentation of [Pelzer] ever receiving these mailings. Lastly, Mr. Geehring stated that there is no other way [Pelzer] would have received the mailings except through the mailroom.

### **(iii) Testimony of [Pelzer]**

[Pelzer] testified that he did not receive Attorney Fannick's April 7, 2004 or August 22, 2007 correspondence.

### **(iv) Testimony of Demetrius W. Fannick, Esquire**

Demetrius W. Fannick, Esquire, testified on behalf of the Commonwealth. None of the correspondence that Attorney Fannick sent to [Pelzer] came back as not being properly addressed.

On cross-examination, Attorney Fannick, acknowledged representing [Pelzer] on the appeal. He was retained by a friend of [Pelzer], Ms. Kiley Harvey. Ms. Harvey made payments to Attorney Fannick for his representation.

As of June 26, 2006, Attorney Fannick testified that he did not intend on filing an appeal because he did not have the information necessary to do so.

Attorney Fannick testified that he has no proof that the letters sent to [Pelzer] were actually received by [Pelzer], however he asserted that he did send the letters in question. Attorney Fannick also testified that he closed [Pelzer]'s file in

2003 or 2004. Although he sent [Pelzer] letters, he testified that he was responding to the letters he received from [Pelzer] out of courtesy.

As of April 2007, Attorney Fannick testified that he was not going to file [Pelzer]'s PCRA due to a timeliness issue. Attorney Fannick, however, was willing to review the document [Pelzer] wanted to file but did not believe that he could avert the timeliness issues. Attorney Fannick stated that he would file the documents on his own.

**Discussion:**

The Superior Court vacated the PCRA court's order dismissing [Pelzer]'s petition and remanded [Pelzer]'s PCRA petition for th[e] court to reevaluate [Pelzer]'s petition in light of the new evidence of "legal mail logs and affidavits."

Having considered the new evidence presented by [Pelzer], the testimony of the mailrooms supervisors, [Pelzer] and the additional testimony of Attorney Fannick, this Court is unwilling to conclude that the new evidence proves that [Pelzer] did not receive the April 7, 2004 and August 22, 2007 letters from Attorney Fannick.

In reviewing the testimony of the mailroom supervisor from SCI Fayette and SCI Greene, in particular, that of Mr. Geehring, tends to prove that ... the legal mail was received by [Pelzer] but was never recorded as being received.

PCRA Court Opinion, 6/28/2013, at 2-5 (record citations omitted; emphasis in original).

Given our standard and scope of review, as well as the findings of the PCRA court, which were supported in the certified record, we conclude the court did not err in denying Pelzer's petition. In reaching this conclusion, we are guided by the following:

A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference

by reviewing courts. **See, e.g., Commonwealth v. (Damon) Jones**, 590 Pa. 202, 912 A.2d 268, 293 (2006); **Commonwealth v. Santiago**, 579 Pa. 46, 855 A.2d 682, 694 (2004) (Opinion Announcing the Judgment of the Court) (“[W]e are bound by the PCRA court’s credibility determinations where there is record support for those determinations.”); **Commonwealth v. Abu-Jamal**, 553 Pa. 485, 720 A.2d 79, 99 (1998) (“Just as with any other credibility determination, where the record supports the PCRA court’s credibility determinations, those determinations are binding on this [C]ourt.”). Indeed, one of the primary reasons PCRA hearings are held in the first place is so that credibility determinations can be made; otherwise, issues of material fact could be decided on pleadings and affidavits alone[.]

. . .

When a PCRA hearing is held, and the PCRA court makes findings of fact, we expect the PCRA court to make necessary credibility determinations. A PCRA proceeding is an attack upon a final judgment. Respect for that final judgment counsels that it is not a second trial jury, but the PCRA judge, who must render the [**Strickland v. Washington**, 466 U.S. 668 (1984)] prejudice determination. Were the analysis otherwise, the initial trial would lose its status as the main event, and final criminal judgments would be subject to vacatur based on mere affidavits.

**Commonwealth v. Johnson**, 966 A.2d 523, 539-540 (Pa. 2009).

Here, the evidence presented by Pelzer demonstrated that there was no record of the two letters from Fannick to Pelzer in the legal mail log. **See** N.T., 2/28/2013, at 9, 20. Nevertheless, both Linderman and Geehring indicated that it was possible that the mailings could have been delivered to Pelzer but were not registered in the legal mail log. **See id.** at 12, 23. For example, the following exchange occurred between the PCRA court and Geehring:

THE COURT: Sir, I have just a question. Your affidavit indicates the only mail you received was -- or that was received from Attorney Fannick while Mr. Pelzer was at SCI Geene was in August of 2002, correct?

[Geehring]: Yes, ma'am.

THE COURT: But Mr. Pelzer has filed documents where there were numerous mailings by Mr. Fannick to him at SCI Greene: 1 October 21<sup>st</sup> 2002; October 9<sup>th</sup> 2002; November 25<sup>th</sup>, 2002; ... January 30<sup>th</sup>, 2003, all of which were addressed to him at SCI Greene and he attached for the Court to look at, yet you do not have a single document of any of those being received?

[Geehring]: No, ma'am. This is all I have. I went back three times and checked our archives. This is all we have for that inmate.

THE COURT: And I received these from Mr. Pelzer directly -- well, the Court received them in his appellate filings, so he obviously had letters then. Is there any other way they would have got to him while he was incarcerated through any other source of mail that you're aware of?

[Geehring]: No, ma'am. They would have had to come through the SCI Greene mailroom.

**Id.** at 24-25.<sup>5</sup> Moreover, the PCRA court found Fannick's testimony credible that he sent both letters to Pelzer. As a reviewing court, we are bound by this determination. **See Johnson, supra.**

As such, Pelzer has not met in his burden in demonstrating that he did not receive the April 7, 2004, and August 22, 2007, correspondence letters

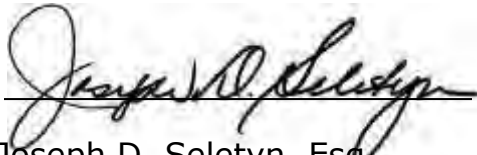
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<sup>5</sup> Pelzer testified that he did not "necessarily receive" these letters but that they had been acquired over the years, including when Fannick turned over his file. **Id.** at 29, 35. We note that Pelzer does not allege that he filed his PCRA petition with receipt of the letters in question pursuant to the 60-day rule under Section 9545(b)(2).

from Fannick, which raised the timeliness requirement. Accordingly, we conclude the PCRA court properly determined Pelzer did not satisfy the exception of Section 9545(b)(1)(ii), with respect to pleading and proving that counsel abandoned him based on the evidence of mail logs and affidavits. Therefore, the PCRA court did not err in denying his petition as it was without authority to address his arguments. Likewise, we are jurisdictionally barred from hearing his substantive issues and will not address his remaining claims further.

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: 7/14/2014