

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	!	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	!	
v.	!	
SHAWN LAMAR BURTON,	!	
Appellant	!	No. 1459 WDA 2013

Appeal from the PCRA Order August 27, 2013  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s):  
CP-02-CR-0004017-1993  
CP-02-CR-0004276-1993

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.\*

MEMORANDUM BY BENDER, P.J.E.:

**FILED JULY 15, 2014**

Shawn Lamar Burton (Appellant) appeals *pro se* from the order entered September 19, 2012, denying as untimely his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We conclude that Appellant's petition satisfies an exception to the one-year time requirement of the PCRA. Accordingly, we vacate the PCRA court's order and remand for an evidentiary hearing.

In September 1993, a jury convicted Appellant of first-degree murder and conspiracy in connection with the strangulation death of Seth Floyd in the Allegheny County Jail. Thereafter, the court imposed the mandatory

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\* Retired Senior Judge assigned to the Superior Court.

sentence of life imprisonment. Appellant's co-defendant, Melvin Goodwine, was convicted of conspiracy but acquitted of the murder charge.

Appellant timely appealed from the judgment of sentence, and this Court affirmed. **See Commonwealth v. Burton**, 688 A.2d 1225 (Pa. Super. 1996) (unpublished memorandum). On August 15, 1997, the Pennsylvania Supreme Court denied allowance of appeal. **See Commonwealth v. Burton**, 700 A.2d 437 (Pa. 1997). Appellant did not petition the United States Supreme Court for writ of *certiorari*.

In August 1998, Appellant filed *pro se* his first PCRA petition. Counsel was appointed but subsequently withdrew due to a disagreement with Appellant. Appellant proceeded *pro se*. Thereafter, the PCRA court dismissed his petition in April 2000. New counsel was appointed and effectuated an appeal, which was dismissed in November 2001 for failure to file a brief. However, counsel successfully sought reinstatement of Appellant's appellate rights *nunc pro tunc* and timely appealed.

On review, the PCRA court's failure to conduct an on-the-record colloquy to determine whether Appellant properly waived his right to his first PCRA counsel resulted in remand by this Court and further proceedings below not relevant to this appeal. Eventually, the PCRA court again denied Appellant's first petition in December 2005. This Court affirmed, **see Commonwealth v. Burton**, 924 A.2d 688 (Pa. 2007) (unpublished memorandum), and the Pennsylvania Supreme Court denied Appellant's

petition for allowance of appeal. **See *Commonwealth v. Burton***, 936 A.2d 39 (Pa. 2007).

On May 30, 2013, Appellant purportedly received a letter from the Pennsylvania Innocence Project (dated May 23, 2013). Enclosed with the letter were copies of (1) a motion to expunge criminal record filed by co-defendant Melvin Goodwine in July 2009, and (2) a court opinion thereafter denying the motion. In his motion to expunge, Goodwine averred that (1) he (Goodwine) killed Seth Floyd in self-defense, (2) he was advised not to use this defense at trial, and (3) as a result, an innocent man went to jail for a crime that he committed. Based upon these court records, the Innocence Project letter suggested that Appellant pursue collateral relief.

On July 11, 2013, Appellant filed *pro se* his second PCRA petition. On August 6, 2013, the PCRA court issued Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition without a hearing. On August 27, 2013, it dismissed the petition. Appellant responded untimely to the court's Rule 907 notice on September 9, 2013. Appellant timely appealed and filed a court-ordered Pa.R.A.P. 1925(b) statement. The PCRA court issued an opinion.

Appellant raises the following issues on appeal:

[1.] Whether the PCRA court erred in denying Appellant's PCRA petition as untimely filed[;]

[2.] Whether the PCRA court violated Appellant's due process[;]

[3.] Whether the district attorneys office erred when it failed to disclose exculpatory evidence[;]

[4.] Whether ... Appellant is entitled to PCRA relief based on newly discovered evidence[; and]

[5.] Whether the PCRA court erred by not holding an evidentiary hearing[.]

Appellant's Brief at 3.

We review an order denying a petition under the PCRA to determine whether the findings of the PCRA court are supported by the evidence of record and free of legal error. ***Commonwealth v. Ragan***, 923 A.2d 1169, 1170 (Pa. 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).

Preliminarily, however, we must address the timeliness of Appellant's petition, as it implicates our jurisdiction. ***Commonwealth v. Bennett***, 930 A.2d 1264, 1267 (Pa. 2007). Under the PCRA, all petitions seeking collateral relief must be filed within one year of the date the judgment of sentence becomes final. ***Id.*** There are three statutory exceptions:

**(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 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). Additionally, any petition attempting to invoke one of these exceptions “shall be filed within 60 days of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2).

Here, Appellant’s judgment of sentence became final on November 13, 1997, ninety days after the Pennsylvania Supreme Court denied Appellant’s petition for allowance of appeal. **See** 42 Pa.C.S. § 9545(b)(3) (providing that judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review); U.S.Sup.Ct.R. 13 (requiring a petition for writ of *certiorari* within 90 days) (effective May 1, 1997). Appellant had until November 13, 1998, to file a timely PCRA petition. Thus, his July 2013 petition was patently untimely.

In the course of presenting his first three issues on appeal, Appellant acknowledges that his petition was untimely but asserts that he qualifies for

both the governmental interference and the “after-discovered facts” exceptions.<sup>1</sup>

Appellant claims that the contents of co-defendant Goodwine’s motion to expunge constitutes exculpatory evidence, inappropriately withheld from Appellant in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). According to Appellant, this alleged ***Brady*** violation interfered with his ability to file his petition previously. Inexplicably, the PCRA court did not address Appellant’s assertion of governmental interference. Nevertheless, we conclude that Appellant’s contention is without merit.

Although a ***Brady*** violation may fall within the governmental interference exception, the petitioner must plead and prove [1] the failure to previously raise the claim was the result of interference by government officials, and [2] the information could not have been obtained earlier with the exercise of due diligence.

***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1268 (Pa. 2008);

***Commonwealth v. Chester***, 895 A.2d 520, 523-24 (Pa. 2006).

Here, the content of Goodwine’s motion to expunge was a matter of public record. Therefore, Appellant cannot establish that the Commonwealth, or the PCRA court, had exclusive control over the purportedly exculpatory evidence or that the Commonwealth denied him

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<sup>1</sup> The Pennsylvania Supreme Court has noted that the “appropriate shorthand terminology for exception (b)(1)(ii) is ‘after-discovered facts[.]’” ***Commonwealth v. Marshall***, 947 A.2d 714, 720 n.4 (Pa. 2008).

access to this evidence. **See Chester**, 895 A.2d at 524. Moreover, any delay in fulfilling an obligation to disclose this evidence to Appellant would not have affected the timeliness of his PCRA petition. Goodwine filed his motion in July 2009, whereas any timely PCRA petition from Appellant had to be filed by November 13, 1998. Thus, the government did not interfere with Appellant's ability to file his petition timely.

However, that does not end our analysis, as we must also address Appellant's contention that his reliance upon the content of Goodwine's motion meets the after-discovered evidence exception. We conclude that it does.<sup>2</sup>

The Pennsylvania Supreme Court "has found matters of public record are not unknown" and, therefore, cannot predicate a timeliness exception. **Commonwealth v. Taylor**, 67 A.3d 1245, 1248 (Pa. 2013) (citing numerous cases). Nevertheless, this Court has recently applied the Pennsylvania Supreme Court's definition of due diligence in this context, concluding that a petitioner's diligence in pursuing collateral relief does not require "perfect vigilance" or "punctilious care." **See Commonwealth v. Davis**, 86 A.3d 883 890-91 (Pa. Super. 2014) (quoting **Commonwealth v.**

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<sup>2</sup> We note that the PCRA court's timeliness analysis of Appellant's after-discovered facts exception is erroneous to the extent the court also conducted a merits analysis. **See Commonwealth v. Bennett**, 930 A.2d 1264, 1270-72 (Pa. 2007).

***Selenski***, 994 A.2d 1083, 1089 (Pa. 2010) (concluding that due diligence is “fact-specific, to be determined case-by-case”).

In our view, Appellant’s efforts were adequately diligent under the circumstances of this case. After receiving a letter from the Innocence Project advising him of the contents of Goodwine’s motion to expunge, Appellant promptly filed a PCRA petition. The timing of Goodwine’s motion is important, as it occurred more than ten years *after* Appellant’s judgment of sentence became final. After such an extended period, we conclude that it is not reasonable to expect Appellant to investigate public records with sufficient regularity to ascertain quickly whether Goodwine may have disclosed potentially exculpatory information concerning Appellant’s case.<sup>3</sup>

Appellant has established an exception to the timeliness requirements of the PCRA. Accordingly, we vacate the order of the PCRA court and remand for an evidentiary hearing to determine the merits of Appellant’s claims.

Order vacated. Case remanded for further proceedings. Jurisdiction relinquished.

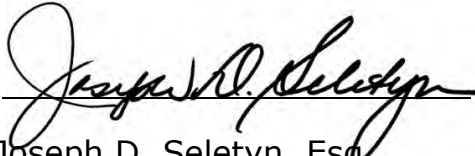
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<sup>3</sup> We note also that the PCRA court reasoned that Appellant’s conviction for conspiracy suggests Appellant must have known previously that Goodwine murdered the victim. This reasoning is not persuasive in light of Appellant’s claim of innocence regarding both murder and conspiracy. Without a factual record developed by the PCRA court, it is impossible to conclude whether Appellant previously knew such facts.



Judge Platt files a dissenting statement.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/15/2014