NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMES JONES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1869 EDA 2013

Appeal from the PCRA Order June 3, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0406201-1982

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

MEMORANDUM BY OTT, J.: **FILED JULY 08, 2014**

James Jones appeals *pro se* from the order of the PCRA court entered June 3, 2013, in the Philadelphia County Court of Common Pleas, dismissing his third petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq*. Savage seeks relief from the judgment of sentence of an aggregate term 19½ to 60 years' imprisonment imposed on **May 13, 1983**, after he was convicted of rape, attempted involuntary deviate sexual intercourse, burglary, and criminal conspiracy.[1] On appeal, Jones argues the PCRA court erred in finding that his petition was untimely filed because prior

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 3121, 3123, 901, 3502, and 903, respectively.

PCRA counsel was ineffective. In addition, he requests DNA testing.[2] For the reasons set forth below, we affirm.

The facts and lengthy procedural history underlying this appeal are as follows. In the early morning hours of November 18, 1981, Jones and a co-conspirator broke into a home on Pepper Terrace in Philadelphia. After ransacking the first floor, they discovered the 10-year-old victim sleeping on the second floor with her 3-year-old brother. The children's mother was not home.[3] Jones woke the girl and raped her. His co-conspirator attempted to penetrate her anally, but was unsuccessful, and then he, too, vaginally raped her. The culprits fled with several items, including $100 worth of frozen meat and the victim's ink-stained book bag. After a neighbor reported Jones was selling meat in the neighborhood, the police showed the victim a photo array including Jones, and she identified him as one of her attackers. Jones was then arrested, and a search of his home uncovered the ink-stained book bag. While no DNA testing was available at the time of Jones's trial, the Commonwealth introduced evidence that victim's fitted bed sheet tested positive for "seminal stains containing spermatozoa." N.T., 11/4/1982, at 3-17.

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[2] ***See*** 42 Pa.C.S. § 9453.1.

[3] The mother testified that she took a walk because she was having trouble sleeping, and did not return for 35 to 40 minutes. N.T., 11/3/1982, at 117, 120.

On November 5, 1982, a jury convicted Jones of rape, burglary, attempted involuntary deviate sexual intercourse and criminal conspiracy. He was sentenced on May 13, 1983, to an aggregate term of 19½ to 60 years' imprisonment. No direct appeal was filed.

On June 3, 1983, however, Jones filed a *pro se* PCRA petition.[4] Over the next five years, three different attorneys were appointed and three amended/supplemental petitions were filed. Ultimately, the PCRA court denied Jones's petition on March 14, 1988, which this Court affirmed on appeal. ***Commonwealth v. Jones***, ___ A.2d ___, 1134 PHL 1988 (Pa. Super. 1988). The Pennsylvania Supreme Court subsequently denied Jones's petition for allocator review on September 6, 1989. ***Commonwealth v. Jones***, ___ A.2d ___, 1030 ED 1988 (Pa. 1989).

Thereafter, on January 13, 2006, Jones filed a second, *pro se* PCRA petition, contending, *inter alia*, that counsel was ineffective for failing to present evidence that no sexual assault occurred. In addition, Jones requested DNA testing, and asserted that "DNA was taken on 7-26-99." Motion for Post Conviction Collateral Relief, 1/13/2006, at 3. The PCRA court ordered that the petition be treated as a request for DNA testing pursuant to 42 Pa.C.S. § 9543.1. Jones subsequently filed a supplemental

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[4] Jones actually filed a petition pursuant to the former Post Conviction Hearing Act (PCHA). However, that Act was amended while his PCHA petition was pending to reflect the current PCRA. ***See*** 42 Pa.C.S. § 9541, 1988, April 13, P.L. 336, No. 47 § 3.

petition on March 31, 2006, asserting newly discovered evidence, namely an affidavit by his sister stating that the book bag found in his possession belonged to her, and not the victim.

Counsel was later appointed, and, on December 11, 2007, filed a petition to withdraw and accompanying ***Turner***/***Finley***[5] "no merit" letter. In the "no merit" letter, counsel averred, *inter alia*, that "[i]n communication with present counsel, it became obvious that petitioner objected to his petition being treated as a DNA motion." "No Merit" Letter, 12/10/2007, at 2-3. Counsel added the following commentary in a footnote:

> On February 23, 2007, petitioner wrote to your Honor indicating that the March 27, 2007 DNA hearing court date should be discontinued. In correspondence with counsel[,] petitioner seems to have changed his mind in this regard. Even if any physical evidence remained to be tested (the bed sheets), the lack of petitioner's DNA would not be of any consequence given that the crime was committed by two men.

Id. at 3 n.1. Furthermore, counsel concluded that Jones's after discovered evidence claim regarding the owner of the book bag was meritless.

Jones filed a response to counsel's "no merit" letter on January 4, 2008, in which he claimed, *inter alia*, that he did **not** ask the PCRA court to discontinue his DNA hearing, and that he still wanted to have the bed sheet tested. On January 14, 2008, the PCRA court sent Jones notice, pursuant to

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[5] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

Pa.R.Crim.P. 907, of its intent to dismiss his petition without first conducing an evidentiary hearing. Thereafter, by order dated February 5, 2008, the PCRA court dismissed Jones's petition as untimely filed, and granted counsel's request to withdraw.

On January 27, 2009, this Court affirmed the order denying PCRA relief, and the Pennsylvania Supreme Court denied Jones's subsequent petition for allowance of appeal in June of 2009. ***Commonwealth v. Jones***, 968 A.2d 791 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 973 A.2d 1006 (Pa. 2009).

Shortly thereafter, on July 17, 2009, Jones filed the present, *pro se* PCRA petition, his third. He asserted the Commonwealth presented false information in its brief before the Supreme Court, during the prior allocator appeal, when it averred that he, himself, requested that his previously scheduled DNA hearing be postponed. He attached to his petition a letter from prior counsel in which she stated she had never requested the hearing be postponed on his behalf, and that "the Commonwealth ha[d] made a mistake if they believe that a test was scheduled and you discontinued it." Letter from Barbara McDermott, Esq. to Jones, 3/23/2009. Further, Jones specifically requested DNA testing pursuant to 42 Pa.C.S. § 9543.1.

On May 13, 2010, Jones filed another *pro se* petition, entitled "Petitioner's Motion for Re-argument and or Re-instatement of DNA Hearing," in which he again claimed that he never asked the PCRA court to discontinue his DNA hearing. However, on February 11, 2011, the PCRA

court sent Jones notice, pursuant to Pa.R.Crim.P. 907, of its intent, once again, to dismiss his petition without a hearing since it was untimely filed. Subsequently, on June 3, 2011, the court dismissed Jones's petition. This timely appeal followed.[6]

On appeal, Jones argues prior PCRA counsel was ineffective when counsel engaged in "ex parte communication," submitted a "no merit" letter which contained false information, namely, that Jones discontinued his request for DNA testing, and "effectively abandoned him." Jones's Brief at 8. To this end, Jones contends his petition was not untimely. Furthermore, he requests the DNA testing that he was previously denied.

Jones's petition filed in the PCRA court involved a request for both PCRA relief, as well as DNA testing. "When presented with a hybrid filing that comingles PCRA claims and a request for DNA testing, the standard set forth in Section 9543.1 requires the court to address the DNA request first and foremost." ***Commonwealth v. Williams***, 35 A.3d 44, 50 (Pa. Super. 2011), *appeal denied*, 50 A.3d 121 (Pa. 2012). Furthermore, "[a] petitioner who is unable to obtain DNA testing under Section 9543.1 can still pursue an ineffective assistance of counsel claim under the PCRA for failure to request DNA testing of evidence at trial, but only if the PCRA petition is timely filed

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[6] The PCRA court did not order Jones to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

or otherwise meets one of the statutory exceptions to the timeliness requirements." ***Id.*** at 50-51. Therefore, we will first consider Jones's request for DNA testing.

When reviewing a trial court's order denying a petitioner's request for post-conviction DNA testing, we employ the same standard of review as when reviewing the denial of PCRA relief, that is, we must determine whether the ruling of the trial court is supported by the record and free of legal error. ***Commonwealth v. Gacobano***, 65 A.3d 416, 419 (Pa. Super. 2013) (citations omitted).

A request for post-conviction DNA is guided by Section 9543.1 of the PCRA.

> The statute sets forth several threshold requirements to obtain DNA testing: (1) the evidence specified must be available for testing on the date of the motion; (2) if the evidence was discovered prior to the applicant's conviction, it was not already DNA tested because (a) technology for testing did not exist at the time of the applicant's trial; (b) the applicant's counsel did not request testing in a case that went to verdict before January 1, 1995; or (c) counsel sought funds from the court to pay for the testing because his client was indigent, and the court refused the request despite the client's indigency. 42 Pa.C.S.A. § 9543.1(a)(2). Additionally,
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> > [T]he legislature delineated a clear standard—and in fact delineated certain portions of the standard twice. Under section 9543.1(c)(3), the petitioner is required to present a prima facie case that the requested DNA testing, assuming it gives exculpatory results, would establish the petitioner's actual innocence of the crime. Under section 9543.1(d)(2), the court is directed not to order the testing if it determines, after review of the trial record, that there is no reasonable possibility that the testing would produce exculpatory evidence to establish petitioner's actual

> innocence. From the clear words and plain meaning of these provisions, there can be no mistake that the burden lies with the petitioner to make a prima facie case that favorable results from the requested DNA testing would establish his innocence. We note that the statute does not require petitioner to show that the DNA testing results would be favorable. However, **the court is required to review not only the motion [for DNA testing], but also the trial record, and then make a determination as to whether there is a reasonable possibility that DNA testing would produce exculpatory evidence that would establish petitioner's actual innocence**. We find no ambiguity in the standard established by the legislature with the words of this statute.
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> ***Commonwealth v. Smith***, 889 A.2d 582, 584 (Pa.Super.2005), *appeal denied*, 588 Pa. 769, 905 A.2d 500 (2006) (emphasis added). The text of the statute set forth in Section 9543.1(c)(3) and reinforced in Section 9543.1(d)(2) requires the applicant to demonstrate that favorable results of the requested DNA testing would establish the applicant's actual innocence of the crime of conviction. ***Id.*** at 585. The statutory standard to obtain testing requires more than conjecture or speculation; it demands a prima facie case that the DNA results, if exculpatory, would establish actual innocence. ***Id.*** at 586.

Williams, ***supra***, 35 A.3d at 49-50 (some emphasis added).

Here, Jones's request for DNA testing on the victim's bed sheet necessarily rests on the underlying premise that the lack of his DNA on her bed sheet would demonstrate his actual innocence of the crime. We disagree. In this case, there were two assailants who both raped the victim. Therefore, the absence of Jones's DNA on the bed sheet does not definitively prove that he did not rape the victim, as any DNA discovered on the sheet could be from his co-conspirator. Therefore, we agree with the conclusion of the PCRA court that Jones "has made no averments, which might demonstrate any possibility that favorable testing results would establish his

innocence." PCRA Court Opinion, 6/3/2013, at unnumbered 3.[7] Accordingly, we detect no error on the part of the PCRA court in denying Jones's request for DNA testing.

In a related claim, Jones argues prior PCRA counsel was ineffective for engaging in unnamed "ex parte communication," and "effectively abandon[ing] him." Jones's Brief at 8. Jones contends he was denied the right to counsel because PCRA counsel falsely stated in her "no merit" letter that Jones asked the PCRA court to discontinue his DNA hearing, and then, subsequently, took no action on his behalf to determine if this was true. We agree with the conclusion of the PCRA court that Jones's petition was untimely filed.

The PCRA mandates that any petition for relief, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final[.]" 42 Pa.C.S. §9545(b)(1).

> 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.

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[7] We decline to affirm the PCRA court's order based upon its conclusion that Jones "failed to specify an item for testing." ***Id.*** While it is true that Jones did not mention the victim's bed sheet in his PCRA petition, a review of the prior PCRA filings reveals the bed sheet was the item that Jones sought to have tested for the presence of his DNA.

Commonwealth v. Jones, 54 A.3d 14, 16 (Pa. 2012) (internal citations omitted). Here, Jones's petition, filed 26 years after his judgment of sentence became final is patently untimely. ***See Commonwealth v. Jones***, 968 A.2d 791 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 973 A.2d 1006 (Pa. 2009) (finding Jones's prior PCRA petition, filed on January 13, 2006, was untimely filed).

However, the PCRA provides three exceptions to the time-for-filing requirements.[8] In his *pro se* petition, Jones attempts to invoke the newly discovered evidence exception, which permits the untimely filing of a petition when (1) "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[,]" and (2) the petition is filed "within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9543(b)(1)(ii) and (2). He argues he did not learn of counsel's abandonment and "ex parte communication" until the Commonwealth mentioned his purported withdraw of his prior DNA claim in its allocator brief before the Supreme Court. Further, he contends he filed the most recent PCRA petition within 60 days of the date the Supreme Court denied allowance of appeal. ***See*** Motion for Post Conviction Relief, 7/17/2009, at unnumbered 10.

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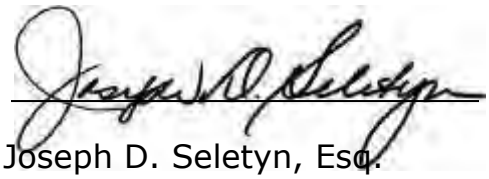
[8] ***See*** 42 Pa.C.S. § 9545(b).

Assuming, *arguendo*, that this claim qualifies as newly discovered evidence, and Jones raised the claim in the trial court within 60 days of the date it could have been presented, we conclude Jones is, nevertheless, entitled to no relief. His primary contention is that, but for counsel's ineffectiveness, the PCRA court would have ordered DNA testing. However, as discussed ***supra***, Jones has not demonstrated that he is entitled to testing under the PCRA because a negative result would not establish his actual innocence of the crime. Accordingly, no relief is warranted.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/8/2014