NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN HAYNES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1947 EDA 2013

Appeal from the PCRA Order June 21, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0904461-1994

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 17, 2014**

John Haynes appeals from the June 21, 2013 order dismissing his fourth PCRA petition as untimely. We affirm.

We summarize the facts giving rise to Appellant's convictions for second-degree murder, robbery, criminal conspiracy, and possessing an instrument of crime ("PIC"). On March 30, 1994, Appellant and co-defendant Marvin Baskerville approached a parked car occupied by Darren Williams and David Anderson. Appellant, armed with a handgun, went to the driver's side of the vehicle and ordered Mr. Williams to turn over his jewelry. As Mr. Williams started to remove his watch, he pushed Appellant's gun away and attempted to drive away. Appellant fired multiple shots at Mr. Williams, striking him in the shoulder and back. The vehicle crashed and Mr.

Williams died from his gunshot wounds. Appellant and Baskerville were arrested and charged with the robbery and murder.

At a joint trial, Baskerville testified that Appellant was the shooter and maintained that he participated only because he owed money to Appellant's partner. David Anderson, who knew Appellant prior to the incident, also identified him as the shooter. Following a six-day trial, a jury found Appellant guilty and the court sentenced him to life imprisonment for the murder conviction, a concurrent five to ten years in prison on the conspiracy, and six months to one year for PIC. This Court affirmed judgment of sentence, and the Supreme Court denied allowance of appeal on February 12, 1997. ***Commonwealth v. Haynes***, 685 A.2d 209 (Pa.Super. 1996) (unpublished memorandum), *appeal denied*, 689 A.2d 232 (Pa. 1997).

Appellant filed his first *pro se* PCRA petition on March 31, 1997, and counsel was appointed. Counsel filed a no-merit letter and sought permission to withdraw. The petition was dismissed, counsel was permitted to withdraw, and Appellant did not appeal. Appellant filed a second PCRA petition on December 18, 2000, counsel was appointed, and it was dismissed without a hearing as untimely. This Court affirmed on appeal and the Supreme Court denied allowance of appeal. ***Commonwealth v. Haynes***, 797 A.2d 372 (Pa.Super. 2002) (unpublished memorandum), *appeal denied* 805 A.2d 520 (Pa. 2002).

Appellant's third *pro se* PCRA petition was filed on April 8, 2008. Privately-retained counsel Robert Mozenter filed an amended petition on Appellant's behalf, and asserted therein that Appellant's co-defendant, Marvin Baskerville, had recanted and that this newly discovered fact was unknown to Appellant until February 2008. The PCRA court held an evidentiary hearing at which Baskerville offered the following testimony. Baskerville was in isolation at SCI Graterford in November and December 2008 and part of January 2009. After he was returned to the general population, he came into contact with Appellant, who was also incarcerated in that institution. He apologized to Appellant for blaming him for the murder, offered to help, and subsequently drafted an affidavit, which was executed on March 3, 2008. Baskerville recited therein that, contrary to his trial testimony, he first met Appellant in court in April 1995 and that Appellant did not rob or murder Mr. Williams.

On direct examination, Baskerville testified consistently with his affidavit. Upon cross-examination, however, the Commonwealth succeeded in eliciting highly inconsistent testimony from Baskerville. The PCRA court ultimately ruled that Baskerville's recantation was not credible.[1] PCRA relief was denied on January 20, 2010, and no appeal was taken.

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[1] The PCRA court also concluded that even if Baskerville's recantation was credible, it was not sufficient to meet the high burden for relief on a second or subsequent PCRA.

Appellant filed a petition for writ of *habeas corpus* on December 15, 2010, which was treated as a fourth PCRA petition. Current counsel was appointed, and counsel filed an amended PCRA petition and supporting memorandum on August 16, 2012. The substance of Appellant's claim was that PCRA counsel Mozenter was ineffective because he failed to file a requested appeal from the January 20, 2010 order denying relief on Appellant's third PCRA petition. The Commonwealth moved to dismiss the petition as untimely, averring that the petition was filed more than a dozen years after judgment of sentence became final and that Appellant had not alleged or offered proof that any of the exceptions to the time bar applied. The PCRA court conducted evidentiary hearings on April 26, 2013 and June 21, 2013, to determine whether Appellant could prove an exception to the time bar.

At the evidentiary hearing, Appellant's mother, Deborah Haynes, testified that she met with Attorney Mozenter within two weeks of the dismissal. She was prepared to pay him $1500 to file an appeal on her son's behalf, but he did not accept payment. According to Ms. Haynes, the attorney told her that it was too time-consuming, but she was left with the impression that he was filing the appeal but would need additional payment. Her attempts to contact Mr. Mozenter after that time were unsuccessful.

Appellant testified that Mr. Mozenter assured him just prior to the court's January 20, 2010 dismissal that he would file an appeal. In

February, Appellant was unable to reach Mr. Mozenter to inquire about the status of the appeal. In early March, Appellant wrote two letters, one to the criminal appeals unit and the other to the Superior Court. Several days later, on March 11, 2010, Appellant's mother reported to him that Mr. Mozenter had advised that the case was too time-consuming. ***Id***. at 37. A March 12, 2010 response from the Post-Trial Unit indicated that, after a thorough search, they could not locate a notice of appeal filed on his behalf. Therein, they advised Appellant that if he wished to have his appellate rights reinstated, he should file a *pro se* PCRA petition, a copy of which was enclosed for his convenience. ***Id***. at 56. Appellant did not file a *pro se* petition.

Appellant's former PCRA counsel, Robert Mozenter, testified that he did not discuss filing an appeal with Appellant at the time of the dismissal of the third PCRA petition. He acknowledged, however, that he was aware that Appellant wanted to file a direct appeal. Counsel testified that Appellant's mother approached him about filing an appeal, that he told her there was no merit to an appeal, and that he would not undertake it. He explained that, in his experience, since the judge ruled that Baskerville was not credible, there was "[n]ot much the appellate court is going to do about that." ***Id***. at 78. Attorney Mozenter recalled telling Ms. Haynes that an appeal would be time-consuming and that Appellant's "chances were slim to none." ***Id***. at 81. Counsel maintained that he did not agree to take the appeal, never told

Appellant or his mother that he would file an appeal, and he did not accept any payment to do so. ***Id***. at 80. He described a longstanding relationship with Ms. Haynes and her family. In fact, after representing Appellant on the PCRA, he represented Ms. Haynes' other son when he was charged with resisting arrest.

The PCRA court dismissed the instant petition as untimely. The court noted that Appellant had until May 18, 1998 to file a PCRA petition, and that Appellant's fourth petition was more than twelve years too late. Furthermore, the court concluded that none of the exceptions to the one-year time limitation of 42 Pa.C.S. § 9545(b) applied. The court found no newly discovered fact as it credited Mr. Mozenter's testimony that he had declined to file an appeal on Appellant's behalf, that the attorney communicated such to Appellant's mother, and that he had not misled Appellant into believing that he would file an appeal. Trial Court Opinion, 8/13/13, at 4.

Appellant appealed, complied with the court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal, and the matter is ripe for our review. Appellant's sole issue on appeal is, "Did the PCRA Court err in dismissing [his] [a]mended PCRA [p]etition when the evidence and pleadings in the case clearly established that Appellant had timely requested that his attorney file a [n]otice of [a]ppeal and that after

his attorney failed to do so Appellant took every step possible to assert his rights and have his appeal reinstated?" Appellant's brief at 6.

"Our standard of review of the denial of a PCRA petition is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error." ***Commonwealth v. Feliciano***, 69 A.3d 1270, 1274-75 (Pa.Super. 2013). "Our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." ***Commonwealth v. Medina***, 2014 PA Super 108 (Pa.Super. 2014) (*en banc*) (quoting ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012)). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court[,]" but we review the PCRA court's legal conclusions *de novo*. ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011).

All PCRA petitions must be filed within one year of the time when a defendant's judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). There are three exceptions to the one-year time bar, however. In order to avail himself of an exception, the petitioner has the burden of proving either that the government interfered with his ability to present his claim, or that he has recently discovered the facts upon which his PCRA claim is predicated, or that the state Supreme Court or the United States Supreme Court has recognized a new constitutional right and made that right

retroactive. 42 Pa.C.S. § 9545(b)(1)(i-iii). The PCRA also provides that any exception must be pled within 60 days of when it "could have been presented." 42 Pa.C.S. § 9545(b)(2). It is the petitioner's burden to allege and prove one of the timeliness exceptions, and the court makes a threshold determination of whether he has met that burden before considering the merits of any claim. ***Commonwealth v. Edmiston***, 65 A.3d 339, 346 (Pa. 2013). The PCRA's time requirements are jurisdictional. ***Id***.

The PCRA court calculated that Appellant's judgment of sentence became final ninety days after February 12, 1997, when the Pennsylvania Supreme Court denied allowance of appeal, and that Appellant had until May 18, 1998 to file a PCRA petition.[2] Thus, Appellant's fourth PCRA petition, a petition for writ of *habeas corpus* filed on December 15, 2010, was facially untimely, and the PCRA court had no jurisdiction to entertain it unless Appellant pled and proved one of the three statutory exceptions. 42 Pa.C.S. § 9545(b). Appellant alleged, however, that Mr. Mozenter was ineffective *per se* because he failed to file a requested appeal from the dismissal of his third petition, and Appellant asked that his appeal rights be reinstated *nunc pro tunc*. Although Appellant did not specifically plead the applicability of any of the three exceptions to the one-year time-bar, he raised the specter of abandonment by counsel, which may constitute a newly discovered fact

[2] The Commonwealth computes the date as May 13, 1998.

for purposes of the PCRA. ***See Commonwealth v. Bennett***, 930 A.2d 1264 (Pa. 2007). Thus, the PCRA court held the April 26, 2013 evidentiary hearing for the sole purpose of determining whether the claims Appellant raised in his fourth PCRA petition invoked one of the exceptions to the PCRA's time bar.[3]

In order to avail oneself of the newly discovered fact exception, "a petitioner must establish that: 1) 'the facts upon which the claim was predicated were unknown' and 2) 'could not have been ascertained by the exercise of due diligence.'" ***Commonwealth v. Medina***, 2014 PA Super 108 (Pa.Super. 2014) (*en banc*) (quoting 42 Pa.C.S. § 9545(b)(1)(ii)); ***Bennett***, ***supra*** at 1272. "Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence." ***Id***.

The PCRA court concluded that Appellant failed to prove the newly discovered fact, *i.e.*, that counsel had abandoned or misled him. The PCRA

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[3] Appellant argues that the granting of an evidentiary hearing necessarily connotes that the PCRA court found the petition timely and was entertaining the merits. That is incorrect. Our High Court has remanded for evidentiary hearings to determine whether or not counsel's failure to file a brief constituted abandonment of counsel in ***Commonwealth v. Bennett***, 930 A.2d 1264 (Pa. 2007). ***See also Commonwealth v. Lasky***, 934 A.2d 120, 122 (Pa.Super. 2007) (ordering remand for an evidentiary hearing to determine whether counsel's failure to file a timely PCRA petition was abandonment).

court found that Mr. Mozenter never agreed nor assured Appellant or his mother that he would file an appeal, that counsel did not accept a fee for that service, and that counsel urged Appellant's family to retain another attorney as the case was not worthy of an appeal. Having failed to prove a newly discovered fact that could bring his facially untimely petition within that exception, the petition was untimely.

Appellant's position on appeal ignores the potentially binding effect of the PCRA court's finding that Mr. Mozenter was credible and that he did not abandon Appellant. Appellant persists in arguing that counsel's failure to file a requested appeal was a newly discovered fact that could not be discovered with the exercise of due diligence, and thus, an exception to the PCRA's time bar. He contends that under ***Bennett***, ***supra***, the forfeiture of his appeal rights was a fact unknown to him despite due diligence, and that he is entitled to reinstatement of his appellate rights *nunc pro tunc* from the denial of PCRA relief on his third petition. He argues further that, upon learning that no appeal had been filed, he was duly diligent in attempting to correct that deficiency by contacting the court. Appellant maintains that upon being told, albeit incorrectly, that no appeal could be filed as no final order had been docketed dismissing his PCRA petition, he filed a petition for a final order on April 4, 2010. When there was no response for seven to eight months, Appellant filed the December 15, 2010 petition for writ of *habeas corpus*, which was treated as his fourth PCRA petition, requesting

that his appellate rights be reinstated *nunc pro tunc*. He maintains that his petition is timely because he filed it within one year of the dismissal of his third PCRA petition and within sixty days of his discovery that no notice of appeal had been filed.[4] Appellant avers that he would have filed it within weeks of the discovery "had it not been for the fact that he was informed by court personal [sic] that he could still file an appeal once a final issue was ordered [sic]." Appellant's brief at 21. He maintains that any delay between his discovery that no appeal had been filed and the date of the PCRA petition was due to incorrect information provided by the court system. Thus, he alleges that the PCRA court erred in dismissing his petition as untimely.

Appellant misapprehends ***Bennett*** and the newly discovered fact exception to the PCRA's one-year time bar. While attorney abandonment may constitute a factual basis for the § 9545(b)(1)(ii) newly discovered fact exception, the PCRA court concluded that Appellant was not abandoned as

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[4] Appellant mistakenly calculates the running of the one-year period in which to file a timely PCRA from the court's dismissal of his third PCRA petition, rather than from the date when judgment of sentence became final, which was on or about May 13, 1998. Furthermore, by Appellant's own admission he was advised on March 12, 2010 that no appeal was pending, and was supplied the paperwork to file a *pro se* PCRA petition to reinstate his appellate rights. Appellant chose not to heed that direction and did not file the PCRA within sixty days. While Appellant attributes his failure to timely file the instant PCRA petition to other incorrect information he received, Appellant did not plead or assert below that he was prevented by government officials from presenting his claim within the requisite sixty days.

counsel never agreed to pursue an appeal on his behalf.[5] Furthermore, the one-year period for filing a PCRA commences when judgment of sentence is final, not when the result of a prior collateral proceeding is final. Moreover, Appellant fails to appreciate that the import of the PCRA court's finding that he was not abandoned by counsel is that the factual predicate for the exception to the time bar was not proven. In ***Commonwealth v. Taylor***, 67 A.3d 1245, 1247-1248 (Pa. 2013), the appellant asserted that trial counsel's conflict of interest constituted a newly discovered fact that rendered his facially untimely PCRA petition timely. However, the PCRA court determined after an evidentiary hearing that trial counsel did not have an actual conflict of interest in his representation of the appellant. Absent proof of the factual predicate for the newly discovered fact, our High Court affirmed the dismissal of the petition as untimely.

Moreover, we find support in the record for the PCRA court's credibility and factual determinations. Mr. Mozenter testified that, due to the PCRA court's finding that Baskerville's recantation was incredible, an appeal was not viable. He communicated that opinion to Ms. Haynes. The attorney denied that he promised Appellant that he would file an appeal from the court's adverse ruling, or that he made any such representation to

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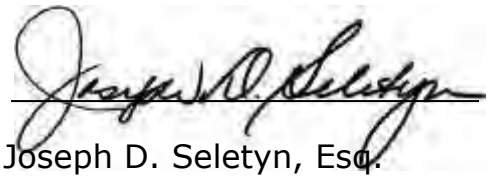
[5] As distinguished from ***Bennett***, involving a first-time PCRA and a rule-based right to counsel, Appellant had no right to counsel on his fourth PCRA petition. ***See Commonwealth v. Turner***, 80 A.3d 754, 766 (Pa. 2013).

Appellant's mother. Furthermore, Mr. Mozenter maintained that he did not accept a fee for that service, a fact confirmed by Ms. Haynes. Ms. Haynes did not testify that the attorney agreed to file an appeal, and she recalled that Mr. Mozenter had mentioned that it was too time-consuming. Where, as here, the record supports the PCRA court's determination that Mr. Mozenter expressly declined to file an appeal on Appellant's behalf, we are bound by those findings on appeal. ***See Commonwealth v. Johnson***, 51 A.3d 237 (Pa.Super. 2012) (*en banc*).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/17/2014