

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BRIAN K. THOMPSON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2150 EDA 2013

Appeal from the PCRA Order July 2, 2013
in the Court of Common Pleas of Chester County
Criminal Division at No.: CP-15-CR-0003498-2005

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

MEMORANDUM BY PLATT, J.:

FILED JUNE 24, 2014

Appellant, Brian K. Thompson, appeals *pro se* from the Order of July 2, 2013, that dismissed as untimely his second petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. For the reasons discussed below, we affirm.

We take the underlying facts in this matter from this Court's August 24, 2007 memorandum on direct appeal and briefly note that on July 7, 2005, Appellant shot and killed the mother of his two children, Crystal Thompson. At trial, Appellant claimed either that the shotgun went off accidentally when he tripped, or that it inadvertently fired while he was cleaning and playing with the gun because he was under the influence of

* Retired Senior Judge assigned to the Superior Court.

drugs and alcohol. (**See Commonwealth v. Thompson**, 743 EDA 2006, unpublished memorandum at 1-3 (Pa. Super. filed August 24, 2007) (quoting Trial Court Opinion, 6/27/06 at 2-3)). To rebut these claims, the Commonwealth offered into evidence both expert testimony and the testimony of Appellant's friend, Richard Mack, who contradicted Appellant's testimony that Appellant had been drinking or doing drugs that morning. (**See id.** at 14).

Following a trial, in March 2006, a jury found Appellant guilty of murder of the first degree and related offenses. On March 16, 2006, the court sentenced Appellant to life imprisonment.

Appellant filed a timely direct appeal. On appeal, Appellant contended that the Commonwealth had failed to turn over **Brady**¹ material and erred when it permitted Mack to testify erroneously that he was not on parole at the time of the murder. (**See id.** at *13). On August 24, 2007, this Court affirmed the judgment of sentence. The Pennsylvania Supreme Court denied leave to appeal on November 19, 2008. (**See Commonwealth v. Thompson**, 960 A.2d 840 (Pa. 2008)).

On January 27, 2009, Appellant, acting *pro se*, filed a timely PCRA petition. The PCRA court appointed counsel to represent Appellant, however, Appellant elected to proceed *pro se*. Following a hearing, on

¹ **Brady v. Maryland**, 373 U.S. 83 (1963).

August 24, 2010, the PCRA court denied Appellant's first PCRA petition. This Court affirmed the denial on August 23, 2011. (**See Commonwealth v. Thompson**, 32 A.3d 840 (Pa. Super. 2011)). The Pennsylvania Supreme Court denied leave to appeal on February 22, 2012. (**See Commonwealth v. Thompson**, 38 A.3d 825 (Pa. 2012)).

On September 21, 2012, Appellant, acting *pro se*, filed the instant second PCRA petition. On May 14, 2013, the PCRA court issued notice of its intent to dismiss the petition pursuant to Pennsylvania Rule of Criminal Procedure 907(1), and Appellant filed a reply on June 14, 2013. On July 2, 2013, the PCRA court dismissed the petition as untimely.

Appellant subsequently filed a timely *pro se* notice of appeal. On July 29, 2013, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant filed a timely Rule 1925(b) statement on August 5, 2013. **See** Pa.R.A.P. 1925(b). On August 26, 2013, the PCRA court issued an opinion. **See** Pa.R.A.P. 1925(a).

Appellant raises three questions on appeal:

I. Did the PCRA [c]ourt err in dismissing as untimely, [Appellant's] PCRA petition filed under the statutorily enumerated exceptions of 42 Pa.C.S.A. § 9545(b)(1)(i) & [(ii)]?

II. Did the PCRA [c]ourt err in not finding that suppression of the **Brady** material regarding the Commonwealth's key witness, Richard Mack's, open pending charges at the time of Appellant's trial violated his due process rights to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution?

III. Did the PCRA [c]ourt err in not finding that the Commonwealth's failure to correct the false testimony of its key witness, Richard Mack, violated Appellant's due process rights to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution?

(Appellant's Brief, at 4).

Our standard of review for an order denying PCRA relief is well-settled:

This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted). However, "if a PCRA [p]etition is untimely, a trial court has no jurisdiction to entertain the petition." **Commonwealth v. Hutchins**, 760 A.2d 50, 53 (Pa. Super. 2000) (citations omitted).

Here, Appellant filed his second PCRA petition on September 21, 2012. The PCRA provides that "[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." 42 Pa.C.S.A. § 9545(b)(1). Appellant's judgment of sentence became final on February 17, 2009, ninety days after the Pennsylvania Supreme Court denied leave to appeal and Appellant did not file a petition for a writ of *certiorari* with the United States Supreme Court. **See** U.S.Sup.Ct.R. 13. Therefore, Appellant had one year, until February 17, 2010, to file a timely PCRA petition. Because Appellant did not file his

current petition until September 21, 2012, the petition is facially untimely. Thus, he must plead and prove that his claim falls under one of the exceptions at Section 9545(b) of the PCRA. **See** 42 Pa.C.S.A. § 9545(b)(1).

Section 9545 provides that the court can still consider an untimely petition where the petitioner successfully 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.

Id. at § 9545(b)(1)(i)-(iii). Further, a petitioner who wishes to invoke any of the above exceptions must file the petition “within [sixty] days of the date the claim could have been presented.” **Id.** at § 9545(b)(2). The Pennsylvania Supreme Court has repeatedly stated that it is an appellant’s burden to plead and prove that one of the above-enumerated exceptions applies. **See, e.g., Commonwealth v. Abu-Jamal**, 941 A.2d 1263, 1268 (Pa. 2008), *cert. denied*, 555 U.S. 916 (2008). Here, Appellant alleges that his petition is timely under Sections 9545(b)(1)(i) and (ii). (**See** Appellant’s Brief, at 13).

Appellant's arguments under both the governmental interference exception and the newly-discovered facts exception are related. Appellant claims that, at the time of trial, the Commonwealth never informed him that witness, Richard Mack, had a pending criminal case. (**See** Appellant's Brief at 13-14).

To plead and prove the governmental interference exception codified at 42 Pa.C.S.A. § 9545(b)(1)(i), Appellant must show that the failure to raise the claim in a timely manner was the result of governmental interference. **See id.** It is well-settled that a **Brady** violation can fall within the governmental interference exception. **See Commonwealth v. Breakiron**, 781 A.2d 94, 98 (Pa. 2001). However, as noted above, Appellant only had sixty days after the discovery of the information to file his PCRA petition and he must plead and prove that the information could not have been discovered earlier with the exercise of due diligence. **Id.** Further, in order to prevail under the newly-discovered facts exception, Appellant must plead and prove that the facts upon which the claim is predicated were unknown to him and could not have been ascertained earlier by the exercise of due diligence. **See Commonwealth v. Bennett**, 930 A.2d 1264, 1273-74 (Pa. 2007). "A petitioner must . . . explain why his asserted facts could not have been ascertained earlier with the exercise of due diligence." **Commonwealth v. Taylor**, 933 A.2d 1035, 1041 (Pa. Super. 2007), *appeal denied*, 951 A.2d 1163 (Pa. 2008) (citation omitted).

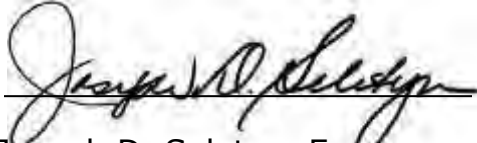
In the instant matter, Appellant has not pleaded facts which demonstrate that he exercised due diligence in obtaining this information regarding Mack. "Our Supreme Court has held for purposes of 42 Pa.C.S. § 9545(b)(1)(ii) information is not 'unknown' to a PCRA petitioner when the information was a matter of public record." **Commonwealth v. Taylor**, 933 A.2d 1035, 1041 (Pa. Super. 2007), *appeal denied*, 951 A.2d 1163 (Pa. 2008) (citing **Commonwealth v. Chester**, 895 A.2d 520, 523 (Pa. 2006) (claim founded on arrest warrant in record of case was based on matter of public record that due diligence would have disclosed to appellant long before filing of PCRA petition). Further, such information in the public record does not constitute **Brady** material, and therefore Appellant's claim under Section 9545(b)(1)(i) is unavailing. **See Commonwealth v. Ligons**, 971 A.2d 1125, 1146 (Pa. 2009) (evidence of pending criminal charges against co-conspirator did not constitute **Brady** material as it was public record equally available to Commonwealth and defense).

Thus, for the reasons discussed above, we hold that Appellant's petition is untimely and he has failed to prove an exception to the time bar. Accordingly, we affirm the denial of his PCRA petition, albeit for a different reason than that expressed by the trial court. **See Commonwealth v. Hernandez**, 886 A.2d 231, 240 (Pa. Super. 2005), *appeal denied*, 899 A.2d 1122 (Pa. 2006) (holding that appellate court may affirm order of trial court on any basis, so long as decision is correct). Because Appellant's petition is

untimely with no statutory exception to the time bar pleaded or proven, the PCRA court was without jurisdiction to address the merits of Appellant's claims, and we are without jurisdiction to review them.

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: 6/24/2014