

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HERNDON STEELE,	:	
	:	
Appellant	:	No. 2440 EDA 2013

Appeal from the PCRA Order July 24, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s): CP-51-CR-1116781-1986

BEFORE: BOWES, WECHT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED JULY 17, 2014

Appellant, Herndon Steele, appeals from the order entered in the Philadelphia County Court of Common Pleas dismissing his third Post Conviction Relief Act¹ ("PCRA") petition. Appellant contends the court erred by dismissing his third PCRA petition and that he should be granted a new trial based on after-discovered evidence. We affirm.

We adopt the facts and procedural history set forth in the trial court's opinion. **See** Trial Ct. Op., 9/20/14, at 1-2. On July 24, 2013, the PCRA court dismissed, after a Pa.R.Crim.P. 907 notice, Appellant's third PCRA petition. On August 15, 2013, Appellant filed a motion to vacate the PCRA

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

J. S45040/14

order, which the PCRA court implicitly construed as a petition for reconsideration. On August 22, 2013, the PCRA court dismissed Appellant's motion. On August 23, 2013, Appellant timely appealed from the July 24, 2013 order. The PCRA court did not order Appellant to comply with Pa.R.A.P. 1925(b).

Appellant raises the following issues:

Where [Appellant] filed a *pro se* petition and two amended petitions claiming that newly discovered evidence compelled the grant of a new trial, but arguably did not plead the first prong of the test for newly discovered evidence, did the lower court err and deny due process in not vacating its order dismissing the petitions and granting a request to file an amended, counseled petition?

Did the lower court err in dismissing the newly discovered evidence petitions as pled where the newly discovered evidence provided significant evidence of actual innocence and met all the tests for the grant of a new trial?

Did the lower court commit error in not addressing all the statements in the petitions to see if they met the test for newly discovered evidence?

Appellant's Brief at 3.²

Before addressing the merits of Appellant's claims, our Supreme Court has required this Court to examine whether we have jurisdiction to entertain the underlying PCRA petition. ***See Commonwealth v. Fahy***, 737 A.2d 214, 223 (Pa. 1999). "Our standard of review of a PCRA court's dismissal of a PCRA petition is limited to examining whether the PCRA court's

² The Commonwealth filed its brief late.

determination is supported by the evidence of record and free of legal error.” **Commonwealth v. Wilson**, 824 A.2d 331, 333 (Pa. Super. 2003) (*en banc*) (citation omitted). A PCRA petition “must normally be filed within one year of the date the judgment becomes final . . . unless one of the exceptions in § 9545(b)(1)(i)-(iii) applies and the petition is filed within 60 days of the date the claim could have been presented.” **Commonwealth v. Copenhefer**, 941 A.2d 646, 648 (Pa. 2007) (internal citations and footnote omitted).

The PCRA’s timeliness 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. It is the petitioner’s burden to allege and prove that one of the [three] timeliness exceptions applies.

Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1267-68 (Pa. 2008) (internal citations omitted).

The three timeliness exceptions are:

(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). “[S]ubsection (b)(1)(ii) does not require the petitioner to allege and prove a claim of ‘after-discovered evidence.’ Rather, it simply requires petitioner to allege and prove that there were ‘facts’ that were ‘unknown’ to him and that he exercised ‘due diligence.’” **Commonwealth v. Bennett**, 930 A.2d 1264, 1270 (Pa. 2007) (footnote omitted). “If the petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection.” **Id.** at 1272. “The focus of the exception is on the newly discovered *facts*, not on a newly discovered or newly willing source for previously known facts.” **Commonwealth v. Marshall**, 947 A.2d 714, 720 (Pa. 2008) (citation omitted).

Instantly, we review whether the PCRA court erred by holding Appellant’s third PCRA petition was untimely. **See** 42 Pa.C.S. § 9545(b)(1), (2); **Abu-Jamal**, 941 A.2d at 1267-68. Appellant’s judgment of sentence became final on August 20, 1990, ninety days after the Pennsylvania Supreme Court denied Appellant’s petition for allowance of appeal.³ Appellant filed the instant petition on June 23, 2011, over twenty years

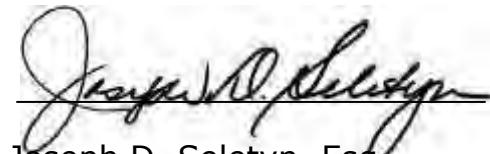
³ Further, because Appellant’s serial petition was filed after January 16, 1996, he could not take advantage of the timeliness exception discussed in **Commonwealth v. Banks**, 726 A.2d 374, 376 (Pa. 1999), which held “that a petitioner whose judgment has become final prior to the effective date of the act[, *i.e.*, January 16, 1996,] shall be deemed to have filed a timely petition . . . if the petitioner’s first petition is filed within one year of the effective date of the act”.

later. Thus, this Court must discern whether the PCRA court erred in concluding Appellant did not plead and prove one of the three timeliness exceptions. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii); **Copenhefer**, 941 A.2d at 648.

In this case, Appellant has not established any of the timeliness exceptions, let alone exercised due diligence—particularly as he averred he spoke to one of his alleged newly-discovered witnesses on the day of the crime. **See** 42 Pa.C.S. § 9545(b)(1)(i)-(iii). Accordingly, we agree with the PCRA court’s determination that Appellant has not properly invoked one of the three timeliness exceptions. **See Abu-Jamal**, 941 A.2d at 1267-68; **Copenhefer**, 941 A.2d at 648. Thus, the PCRA court lacks jurisdiction to consider his petition. **See Fahy**, 737 A.2d at 223. Having discerned no error of law, we affirm the order below. **See Wilson**, 824 A.2d at 333.

Petition to withdraw granted. Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/17/2014

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CRIMINAL SECTION

FILED
SEP 20 2013
CLERK OF COURT
JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

:

CP-51-CR-1116781-1986 Comm. v. Steele, Herndon
Memorandum Opinion

v.



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HERNDON STEELE

:

CP-51-CR-1116781-1986

MEMORANDUM AND ORDER

WOODS-SKIPPER, J

September 20, 2013

This Court hereby dismisses the instant Post Conviction Relief Act Petition filed on June 23, 2011 for the reasons set forth below.¹

I. PROCEDURAL HISTORY

Following a March 1988 jury trial, Petitioner was found guilty of murder in the second degree, robbery, criminal conspiracy, and possession of an instrument of crime. On March 30, 1988, Petitioner was sentenced to life imprisonment on the murder conviction, as well as concurrent terms of incarceration of five to twenty years for robbery, one to five years on the weapons charge, and two and one-half to ten years for conspiracy. Petitioner filed timely post-sentencing motions asking for a new trial. Full hearings were conducted, and all of Petitioner's post-sentence motions were denied on February 15, 1989. Petitioner appealed this decision, and on November 29, 1989, the Superior Court affirmed the judgment of sentence. On May 22, 1990, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal.

¹ This memorandum and order has been issued more than twenty days after Petitioner was served with notice of the forthcoming dismissal of his Post Conviction Relief Act petition. Pa.R.Crim.P. 907.

On January 19, 1996, Petitioner filed his first PCRA petition. Counsel was appointed, and an Amended Petition was filed. After review, on February 24, 1998, the Court dismissed Petitioner's petition. On April 1, 1999, the Superior Court affirmed the dismissal.

On July 1, 2002, Petitioner filed a *pro se* PCRA petition, his second. After review, on November 20, 2002, the Court dismissed Petitioner's petition. On September 19, 2003, the Superior Court affirmed the dismissal. On June 2, 2004, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal.

On June 23, 2011, Petitioner filed the instant petition, his third. Subsequent filings were made September 26, 2012, May 6, 2013, and June 19, 2013. After conducting an extensive and exhaustive review of the record and applicable case law, this Court finds that Petitioner's petition for post conviction collateral relief is untimely filed. Therefore, this Court does not have jurisdiction to consider Petitioner's PCRA petition.

II. DISCUSSION

After a conviction becomes final, a petitioner has one year to file a post conviction petition. Petitioner's conviction became final in 1990. Therefore, Petitioner's June 23, 2011 motion is time-barred unless it properly invokes one of the enumerated exceptions to the one-year limitation.²

² The three exceptions to the one-year limitation are:

- (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.

Petitioner attempts to invoke the after-discovered evidence exception to the PCRA timeliness requirement by submitting an affidavit from a Tredell Robinson. In her statement, Tredell Robinson states that she is co-defendant Tyrone Fitzgerald's cousin, and she was sitting on the steps in front of her house on or about the time of crime. Ms. Robinson saw Petitioner enter the house across the street, which is her grandmother's house; fifteen to twenty minutes later, she heard gunshots that "sounded like they were close by." A few seconds later, Petitioner exited the house and they had a brief conversation. Ms. Robinson avers that Petitioner is innocent because at the time shots were fired, Petitioner was inside her grandmother's house.³

To qualify as after-discovered evidence, Petitioner must plead and prove that "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.A. § 9545 (b)(1)(ii). Moreover, the claim must be filed "within 60 days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2).

Petitioner claims that he has satisfied the 60 day requirement because Petitioner first learned of this information on May 19, 2011, and he filed a PCRA petition with this information on June 23, 2011.⁴ Petitioner is mistaken. "To qualify for the exception to the PCRA time restrictions, found in Section 9545(b)(1)(ii), [Petitioner] had to demonstrate he exercised due diligence in learning the purported 'newly discovered' facts."⁵

In the instant petition, Petitioner offers no explanation as to why this statement could not have been obtained earlier. If Petitioner had a conversation with Tredell Robinson at the

³This is a summary of Tredell Robinson's statement. See Amended Post Conviction Relief Act Petition, 9/26/12, Exhibit A, p. 1.

⁴ Petitioner's June 23, 2011 alleged that a witness had come forth and summarized the testimony Tredell Robinson would give. On September 26, 2012, Petitioner submitted an Amended PCRA Petition that contained a Certification written and signed by Tredell Robinson and dated September 10, 2012.

⁵ *Commonwealth v. Monaco*, 996 A.2d 1076, 1082 (Pa. Super. 2010).

time of the crime, as alleged in Ms. Robinson's statement, then Petitioner knew at the time of trial in 1986 about the existence of an alibi witness. Therefore, the evidence offered is not truly after-discovered. Having known of the existence of Ms. Robinson as a possible alibi witness, Petitioner must plead and prove that he exercised due diligence in procuring her testimony; he has not.⁶

In his May 6, 2013 filing, Petitioner again attempts to invoke the after-discovered evidence exception by submitting a Certification of Witness of Ms. Sonia Wimberley. As previously stated, when invoking the after-discovered evidence exception, the Court must first determine if the claim was filed within 60 days of the date the claim could have been presented. Petitioner avers he complied with the 60 day requirement because the statement was taken on April 23, 2013 and the claim filed May 6, 2013. Petitioner is mistaken. Although Petitioner has filed the claim within 60 days of the interview, Petitioner fails to offer any explanation as to why Ms. Wimberley's testimony was not available before or at trial.

In addition, a petitioner asserting an after-discovered evidence claim must show that new facts constitute exculpatory evidence that would have changed outcome of trial if it had been introduced.⁷ In the instant case, Petitioner has failed to show why the information Ms. Wimberley presents is exculpatory in nature. According to her statement, Ms. Wimberley was not present at the shooting and she did not see Petitioner at the scene of the shooting. The fact

⁶ Upon review of the record, the Court notes that a similar claim was proffered by Petitioner in a post-sentence motion for a new trial. Specifically, Petitioner claimed that trial counsel had been ineffective for failing to present alibi witness Charlene Robinson. In the January 11, 1989 hearing, Petitioner testified that he wanted Charlene Robinson brought in to testify "that [he] was in front of her residence at the time [they] heard the shots." (N.T. 1/11/89 at 43). At the hearing, it was revealed that Charlene Robinson was co-defendant Tyrone Fitzgerald's cousin. (N.T. 1/11/89 at 12). The PCRA court found that Petitioner failed to prove that trial counsel had been ineffective since the decision to not present Charlene Robinson had a reasonable basis; this decision was affirmed by the Superior Court. If Tredell Robinson and Charlene Robinson are indeed the same person as the record suggests, then Petitioner is not eligible for PCRA relief pursuant to 42 Pa.C.S.A. § 9543(a)(3) as this claim has been previously litigated.

⁷ 42 Pa.C.S.A. § 9543(a)(2)(vi); see *Commonwealth v. Gallman*, 838 A.2d 768 (Pa. Super. 2003).

that the co-defendant Fitzgerald stayed with Ms. Wimberley for two weeks after the shooting is not information exculpatory to Petitioner. Therefore, the testimony of this witness would not have changed the outcome of the trial, and this claim is meritless.

Lastly, in his Response to the Notice of Intent to Dismiss, Petitioner alleges that his claim should be heard under the recent United States Supreme Court's decision in *McQuiggen v. Perkins*, __U.S. ___, No. 12-126 (5/28/2013), which held that a showing of actual innocence is sufficient to circumvent the statute of limitations of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). As *McQuiggen* applies to federal habeas corpus petitions, this claim does not provide a basis for relief.

In sum, in his third PCRA petition, Petitioner fails to demonstrate that government officials obstructed the presentation of his claims; fails to offer after-discovered evidence which was previously unknown to him and could not have been obtained by the exercise of due diligence; and does not allege a violation of a constitutional right recognized after the one-year limitation and held to apply retroactively.

Therefore, Petitioner's failure to properly invoke an exception to the timeliness requirements of the Post Conviction Relief Act required this Court to dismiss Petitioner's petition as untimely.

BY THE COURT,



SHEILA WOODS-SKIPPER, J.