NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MWANGI SEKOU, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2717 EDA 2013

Appeal from the PCRA Order of August 27, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1103481-2002

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STABILE, JJ.

MEMORANDUM BY OLSON, J.: **FILED JUNE 25, 2014**

Appellant, Mwangi Sekou, appeals *pro se* from the order entered on December 2, 2013, dismissing his second petition filed under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On February 4, 2004, Appellant was convicted of third-degree murder, first-degree felony aggravated assault, second-degree felony aggravated assault, a violation of the Uniform Firearms Act (VUFA), possessing instruments of crime, and recklessly endangering another person.[1] On April 8, 2004, the trial court sentenced Appellant to serve an aggregate term of 35 to 77 years in prison. Appellant filed a direct appeal. This Court affirmed

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[1] 18 Pa.C.S.A. §§ 2502(c), 2702(a)(1), 2702(a)(4), 6108, 907, and 2705, respectively.

the judgment of sentence on August 31, 2005, and no further review was sought by Appellant.

On January 23, 2006, Appellant filed his first petition for PCRA relief. After multiple hearings, the PCRA court denied relief on June 12, 2007. This Court affirmed the PCRA court's denial on October 27, 2009 and our Supreme Court denied *allocatur* on May 18, 2010.

Appellant filed his second PCRA petition, at issue herein, on July 26, 2012. The PCRA court dismissed his second PCRA petition because it was untimely filed and not subject to exception. This appeal followed. Appellant now raises the following four claims:

> 1. Did the PCRA court abuse its discretion when it used the incorrect standard in determining whether it had subject matter jurisdiction over the PCRA petition?
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> 2. Was the "Notice of Intent to Dismiss" issued by the PCRA court insufficient to meet the requirements of Pa.R.Crim.P. 907?
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> 3. Did the PCRA court abuse its discretion in failing to adhere to the mandatory requirements of Pa.R.Crim.P. 905(B)?
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> 4. Is [A]ppellant entitled to a remand and an evidentiary hearing based on the newly discovered evidence of Zakiyah Williams?

Appellant's Brief at vi.[2]

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[2] We have changed the order of the issues presented by Appellant for ease of disposition.

We "review an order granting or denying PCRA relief to determine whether the PCRA court's decision is supported by evidence of record and whether its decision is free from legal error." ***Commonwealth v. Liebel***, 825 A.2d 630, 632 (Pa. 2003).

The PCRA contains a jurisdictional time-bar, which is subject to limited statutory exceptions. This time-bar demands that "any PCRA petition, including a second or subsequent petition, [] be filed within one year of the date that the petitioner's judgment of sentence becomes final, unless [the] petitioner pleads [and] proves that one of the [three] exceptions to the timeliness requirement . . . is applicable." ***Commonwealth v. McKeever***, 947 A.2d 782, 785 (Pa. Super. 2008); 42 Pa.C.S.A. § 9545(b). Further, since the time-bar implicates the subject matter jurisdiction of our courts, we are required to first determine the timeliness of a petition before we are able to consider any of the underlying claims. ***Commonwealth v. Yarris***, 731 A.2d 581, 586 (Pa. 1999). Our Supreme Court has explained:

> the PCRA timeliness requirements are jurisdictional in nature and, accordingly, a PCRA court is precluded from considering untimely PCRA petitions. ***See***, ***e.g.***, ***Commonwealth v. Murray***, 753 A.2d 201, 203 (Pa. 2000) (stating that "given the fact that the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner"); ***Commonwealth v. Fahy***, 737 A.2d 214, 220 (Pa. 1999) (holding that where a petitioner fails to satisfy the PCRA time requirements, [a court] has no jurisdiction to entertain the petition). [The Pennsylvania Supreme Court has] also held that even where

> the PCRA court does not address the applicability of the PCRA timing mandate, [an appellate court should] consider the issue *sua sponte*, as it is a threshold question implicating our subject matter jurisdiction and [the] ability to grant the requested relief.

Commonwealth v. Whitney, 817 A.2d 473, 475-476 (Pa. 2003).

In the case at bar, Appellant's judgment of sentence became final on December 1, 2005. As Appellant did not file his current petition until July 26, 2012, the current petition is manifestly untimely and the burden thus fell upon Appellant to plead and prove that one of the enumerated exceptions to the one-year time-bar applied to his case. ***See*** 42 Pa.C.S.A. § 9545(b)(1); ***Commonwealth v. Perrin***, 947 A.2d 1284, 1286 (Pa. Super. 2008) (to properly invoke a statutory exception to the one-year time-bar, the PCRA demands that the petitioner properly plead all required elements of the relied-upon exception).

Here, Appellant claims to invoke the "after-discovered facts" exception to the time-bar requirement. This statutory exception provides:

> (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:
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> . . .
>
> (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[;]
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> . . .

> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. § 9545(b).

Appellant attempts to invoke the after-discovered facts exception to the time-bar by providing four affidavits from people with whom he had been associated during the time of the shooting. To properly invoke an exception, the petitioner is statutorily required to file his petition "within 60 days of the date the claim could have been presented." ***Id.*** As our Supreme Court has explained, to satisfy this "60-day requirement," a petitioner must "plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence." ***Commonwealth v. Stokes***, 959 A.2d 306, 310-311 (Pa. 2008); ***Commonwealth v. Breakiron***, 781 A.2d 94, 98 (Pa. 2001). Moreover, because the "60-day requirement" of section 9545(b)(2) is a statutory mandate, the requirement is "strictly enforced." ***Commonwealth v. Monaco***, 996 A.2d 1076, 1080 (Pa. Super. 2010). Here, the PCRA court determined that Appellant "fails to allege the specific date that he became aware of the information all four of [the] individuals would later provide in the form of an affidavit, making it impossible to determine whether the [Appellant] properly pled within the sixty days required." PCRA Court Opinion, 12/2/2013, at 3. Upon review, we agree.

Moreover, to be entitled to relief under the PCRA on the basis of the after-discovered facts exception, the petitioner must plead and prove by a preponderance of the evidence "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi). As our Supreme Court has summarized:

> To obtain relief based on after-discovered evidence, [an] appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted.

Commonwealth v. Pagan, 950 A.2d 270, 292 (Pa. 2008) (citations omitted). "The test is conjunctive; the [appellant] must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted." ***Commonwealth v. Foreman***, 55 A.3d 532, 537 (Pa. Super. 2012) (citation omitted). "Further, when reviewing the decision to grant or deny a new trial on the basis of after-discovered evidence, an appellate court is to determine whether the PCRA court committed an abuse of discretion or error of law that controlled the outcome of the case." ***Id.*** Appellant fails the test on all grounds.

The after-discovered facts exception is specific in that it "focuses on newly discovered **facts**, not on a newly discovered or a newly willing source for previously known facts." ***Commonwealth v. Johnson***, 863 A.2d 423,

427 (Pa. 2004) (emphasis in original). Furthermore, ″a witness's admission of evidence previously available to a petitioner cannot resurrect an untimely PCRA claim as such a result would clearly run contrary to the plain language of [the exception.]" ***Id.***

In support of his claim that his second PCRA petition was timely on the basis of after-discovered evidence, Appellant submits the affidavits of four individuals, Jahaan Mitchell, Denard Hawkins, Karif Holloway, and Jerome Bogerty.[3] Appellant claims that the affidavits establish that Appellant was not the shooter. Specifically, Appellant argues that the affidavits are from persons who witnessed the shooting and now state that someone other than Appellant shot the victim. However, after careful review of the affidavits presented, we find that they present no new facts and that the information contained within the four affidavits would have been known to Appellant at the time of his initial trial. All four affiants purport that they were present at the shooting and Appellant admits to knowing them. Appellant also admitted his presence at the shooting, and, therefore, he would have known of this information since the day the crime was committed. Moreover, Appellant has not shown that he could not have discovered the alleged

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[3] We note that Jerome Bogerty's affidavit is a recantation of the statement that he made to police at the time of the shooting. PCRA Petition, Exhibit A. Recantations have "long been recognized as one of the least reliable forms of after-discovered evidence." ***Foreman***, 55 A.3d at 537, *citing* ***Commonwealth v. McNeil***, 487 A.2d 802, 807 n.4 (Pa. 1985).

evidence sooner through due diligence. The burden was on Appellant at his initial trial to use reasonable diligence to make these facts known. Since Appellant has failed to do so, he subsequently fails to properly satisfy the requirements for newly discovered evidence. Furthermore, Appellant cannot show that the facts he sought to introduce would not be used solely to impeach the eyewitness testimony presented at trial. Because Appellant has failed to plead and prove an exception to the PCRA's one-year time-bar, the PCRA court lacked jurisdiction to entertain Appellant's most recent PCRA petition and supplemental filings and the PCRA petition was properly dismissed. Appellant's first claim, therefore, lacks merit.

In his second issue, Appellant alleges that the PCRA court's notice of their intent to dismiss his petition was insufficient to meet the requirements of Pa.R.Crim.P. 907.[4] More specifically, Appellant claims that the PCRA

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[4] Rule 907 provides, in pertinent part:

> Rule 907. Disposition Without Hearing
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> Except as provided in Rule 909 for death penalty cases,
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> (1) the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the

(Footnote Continued Next Page)

court's notice under Rule 907 stated that his PCRA petition was untimely, not subject to an exception under the PCRA and, therefore, would be dismissed without a hearing. Appellant's Brief at 14. However, Appellant claims that the PCRA court subsequently "filed an opinion citing technical deficiencies in the pleadings as its reasoning for dismissal." ***Id.***

Upon review of the record, we disagree. The PCRA court dismissed the petition because it was untimely and not subject to exception for the reasons cited above. Moreover, the PCRA court followed the proper procedure and timeline outlined under Pa.R.Crim.P. 907. On March 6, 2013, the Appellant was notified by the PCRA court that his petition would be dismissed in 20 days because it was untimely. It clearly informed the Appellant that he had failed to invoke the after-discovered facts exception to the time-bar requirement in his PCRA petition and supplemental petition. The notice of intent to dismiss also informed him that he could respond to the petition within 20 days. Appellant exercised his right to respond, and filed a response on March 18, 2013 and further a second supplemental amended PCRA petition on July 29, 2013, in which Appellant again attempted to

(Footnote Continued)

> dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

Pa.R.Crim.P. 907.

invoke the after-discovered facts exception. We determine that the PCRA court followed the proper procedure under Rule 907 and since the PCRA court lacked jurisdiction over Appellant's untimely petition, a dismissal was proper without further proceedings. Accordingly, Appellant's second issue lacks merit.

In his third issue, Appellant alleges that Pa.R.Crim.P. 905(B)[5] mandates that the PCRA court, *sua sponte*, grant him the opportunity to supplement his time-barred petitions for PCRA relief *ad infinitum*. Appellant's interpretation of Rule 905(B) is incorrect and inconsistent with the plain language of the rule. This Court has held that Rule 905(B) applies only to a first-time submitted PCRA petition, not second or subsequent petitions such as the one at issue here. ***Commonwealth v. Austin***, 721 A.2d 375, 379 (Pa. Super. 1998). (Pa.R.Crim.P. 1505(B), identical predecessor of current Rule 905(B), requiring the PCRA judge to order an amendment of a PCRA petition to eliminate defects is designed to apply to first PCRA petitions.) After filing his second PCRA petition, Appellant filed two amended, supplemental PCRA petitions, which the PCRA court accepted. Rule 905 does not require the PCRA court to infinitely accept amendments to

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[5] Rule 905(B) of the Rules of Criminal Procedure provides in pertinent part: "When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed." Pa.R.Crim.P. 905(B).

a second PCRA petition. Accordingly, Appellant's third claim is without merit.

Finally, Appellant argues that his case should be remanded to the PCRA court for further consideration as he learned of additional witnesses at the time his current appeal was pending before this Court. Appellant's notice of appeal was filed on September 19, 2013. On November 13, 2013, Appellant filed with this Court an "Application to Stay Proceedings in the Superior Court, Based Upon After-Discovered Evidence, and Request to Remand Case Back to the Trial Court." In his application, Appellant asserts that he learned of three witnesses with new evidence relevant to his case. Attached to the application are the "witness certifications"[6] of Zakiyyah Williams, Bernadine Branch and Shana Ryles-Sekou. The certification with respect to Ms. Williams indicates that Ms. Williams approached Ms. Branch (Appellant's mother) and Ms. Ryles-Sekou (Appellant's wife) at a prayer service on October 15, 2013 at which time she advised them that her brother, Jonathan Williams, confessed to her years ago that he was the person responsible for killing the victim. The certification goes on to state that Ms. Williams told the other women that her brother told her in 2004 that Appellant was in prison for a crime that he did not commit and that her

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[6] The "witness certifications" contain the names and addresses of the witnesses and a summary of their proposed testimony. Application to Stay Proceedings, Exhibits A, B and C.

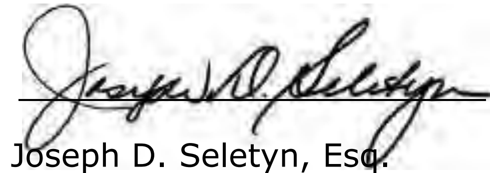
brother promised to turn himself in once he got his affairs in order. Unfortunately, Jonathan Williams was killed in 2004 before he could turn himself into the police. The certifications for Ms. Branch and Ms. Ryles-Sekou merely reiterate that Ms. Williams made these statements to them on October 15, 2013 and that Ms. Ryles-Sekou relayed this information to Appellant on October 26, 2013. On December 6, 2013, this Court entered an order denying the application without prejudice to Appellant's right to re-apply for a remand in his brief. In his appellate brief, Appellant again asks that we remand his case to the PCRA court for an evidentiary hearing on the basis of the new evidence obtained from Ms. Williams. Appellant's Brief at 11-13.

The purported newly discovered evidence comes from three potential witnesses, who were not at the scene of the crime, who claim another party confessed to shooting the victim. This claim is wholly dissimilar from the claims asserted in the PCRA petition currently on appeal to this Court. The proffered new evidence would not support the original claims presented and, hence, should be presented to the PCRA court, via a separate PCRA petition, in the first instance. Our Supreme Court has held that "when an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review." ***Commonwealth v. Lark***, 746 A.2d 585 (Pa.

2000). The subsequent PCRA petition must be filed within 60 days of the date of the order which finally resolves the previous PCRA petition. ***Id***. In order to consider Appellant's subsequent PCRA petition, the current petition before us now must be resolved. Therefore, we deny Appellant's request to stay the appellate proceedings and remand to the PCRA court based upon after-discovered evidence and Appellant's final issue is without merit.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/25/2014