

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

PATRICK BROWN

Appellant

No. 3149 EDA 2012

Appeal from the PCRA Order October 18, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0605961-2006
CP-51-CR-0606161-2006

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

MEMORANDUM BY OTT, J.:

FILED MAY 19, 2014

Patrick Brown appeals *pro se* from the order entered October 18, 2012, in the Court of Common Pleas of Philadelphia County, that dismissed, as untimely, his second petition filed pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546. On December 18, 2006, Brown tendered a negotiated guilty plea to criminal attempt — attempted aggravated assault, in connection with the minor victim, R.D. at Criminal Docket No. CP-51-CR-0605961-2006), and to rape, endangering the welfare of a child, and corrupting the morals of a minor, in connection with the minor victim, D.D. at Criminal Docket No. CP-51-CR-0606161-

* Retired Senior Judge assigned to the Superior Court.

2006.¹ That same day, Brown was sentenced to an aggregate term of 15 to 30 years' incarceration.² In this appeal, Brown challenges the dismissal of his PCRA petition, claiming his second petition is timely filed pursuant to the PCRA's statutory exceptions.³ **See** Brown's Brief at 10, ¶8 ("Is a PCRA petition/motion considered properly filed due to exceptions in state rules?").

Based upon the following, we affirm.

The PCRA Court has summarized the procedural history following sentencing, and the underlying facts, as follows:

¹ In addition, Brown pleaded guilty to indecent assault and endangering the welfare of a child in a separate case involving the minor victim, L.D., at Criminal Docket No. CP-51-CR-0606151-2006. **See** N.T., 12/18/2006, at 10-12. That case is not at issue in this appeal.

² Brown was sentenced on CP-51-CR-0606161-2006 to consecutive terms of ten to 20 years' imprisonment for rape, two and one half to five years' imprisonment for endangering the welfare of a child, and two and one half to five years' imprisonment for corrupting the morals of a minor. On CP-51-0605961-2006, Brown was sentenced to a term of five to ten years' imprisonment for criminal attempt — aggravated indecent assault, to run concurrent with the sentence at CP-51-CR-0606161-2006. No appeal was filed from these sentences.

³ Brown, in his *pro se* brief, also raises claims of trial counsel's ineffectiveness and trial court error. In addition, Brown contends that (1) the evidence was false, (2) the evidence demonstrated there was no sexual penetration or attempted penetration, (3) the authorities committed an abuse of discretion in bringing charges that were known not to be supported by probable cause, (4) the authorities violated state rules in continuing a prosecution on charges that were not supported by probable cause, and (5) the authorities knowingly fabricated evidence. **See** Brown's Brief at 9-10.

On August 11, 2008, [Brown] filed a [] *pro se* PCRA petition. On January 8, 2010, [Brown's] attorney filed a **Finley**⁴ letter. On January 12, 2010, [the PCRA court] issued a Letter of Intent to Dismiss under Rule of [Criminal] Procedure 907 because [Brown's] attorney determined that the issues raised in the petition were without merit. On April 8th, 2010 [the PCRA court] formally dismissed the petition.

On July 23, 2010, [Brown] filed an untimely [second] PCRA petition *pro se*. On October 28, 2011, [Brown] amended his own PCRA Petition. Emily Beth Cherniack, Esquire filed a **Finley** letter on December 9, 2010. On July 11, 2011, an amended PCRA Petition was filed by [Brown]. On August 17, 2011, the [PCRA court] issued a Letter of Intent to Dismiss under Rule of [Criminal] Procedure 907. On December 1, 2011, [Brown] filed a motion to amend his PCRA Petition.

On January 24, 2012, the PCRA Petition was reassigned to this Court, the Honorable Denis P. Cohen, Judge of the Court of Common Pleas, as [the former PCRA court judge] had retired. On August 17, 2012, this Court issued a Letter of Intent to Dismiss under Rule of [Criminal] Procedure 907 because the petition was untimely. On August 23, 2012 [Brown] filed a *pro se* Motion for Leave of Court to amend his PCRA Petition. On September 4, 2012 [Brown] filed a *pro se* response to the issuance of a 907 Letter. On October 1[8], 2012, this Court formally dismissed [Brown's] PCRA Petition.

On January 12, 2012, [Brown] filed a *pro se* post trial motion to rescind his sentence and withdraw a guilty plea. [The motion was denied by operation of law on July 11, 2012.] [Brown] filed a *pro se* notice of appeal on [November 7], 2012. On November 16, 2012 this Court issued an order pursuant to Pa.R.A.P. 1925(b) directing [Brown] to submit a Statement of Matters Complained of on Appeal within twenty-one (21) days. [Brown] filed a *pro se* Statement of Matters Complained of on Appeal on December 7, 2012[.]

⁴ **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

On a number of occasions between February 2, 2005 and December 1, 2005, while in his home on [] Street in Philadelphia, [Brown] improperly touched his daughter (the victim D.D.), then ten years old, in her bedroom. (N.T. 12/18/2006 at 9-10). [Brown] forced the victim to lie on her back and unzip her pants. [Brown] touched her vagina. On one occasion [Brown] placed his penis inside the victim's vagina. (*Id.* at 10).

On approximately five separate occasions during the same time period, [Brown] pulled ten year old L.D. (also a victim) into his bedroom and forcibly removed her clothes. [Brown] touched her pelvic region with his penis. (*Id.* at 10).

... In June, 2003,[sic⁵] at [] Street in Philadelphia, [Brown] pushed R.D., then six years old, onto her bed while they were watching TV. (N.T. 12/18/2006 at 11). [Brown] pinned her head back and placed his hands underneath her shorts. She pushed [Brown's] hands away repeatedly. She eventually pushed [Brown] away successfully and left the room. (*Id.* at 11). Thereafter, she reported the incident to the police. (N.T. 6/08/2006 at 15-16).

PCRA Court Opinion, 6/27/2013, at 2-4 (some footnotes omitted).

The principles that guide our review of the PCRA court's order dismissing Brown's petition are well settled:

[T]he standard of review for review of an order denying a PCRA petition is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ragan***, 592 Pa. 217, 923 A.2d 1169, 1170 (Pa. 2007). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 2001 PA Super 54, 768 A.2d 1164, 1166 (Pa. Super. 2001).

⁵ At the guilty plea hearing, at Criminal Docket No. CP-51-CR-0605961-2006, the Commonwealth "ma[d]e an amendment to change the date of the incident from 11/28/2003 to the entire year, 1/1/2003 through December 31st of 2003." N.T., 12/18/2006, at 11.

As a threshold jurisdictional matter, however, the timeliness of the PCRA petition must be addressed. 42 Pa.C.S. § 9545(b) sets forth the time limitations for filing of a PCRA petition as follows:

(b) Time for filing petition.—

(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:

(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.

(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. § 9545(b)(1)–(2).

Petitioners must plead and prove the applicability of one of the three exceptions to the PCRA timing requirements. ***Commonwealth v. Perrin***, 2008 PA Super 91, 947 A.2d 1284 (Pa. Super. 2008); ***Commonwealth v. Geer***, 2007 PA Super 326, 936 A.2d 1075, 1078–1079 (Pa. Super. 2007). “If the petition is determined to be untimely, and no exception has been

pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition.” **Perrin**, 947 A.2d at 1285.

Commonwealth v. Johnston, 42 A.3d 1120 (Pa. Super. 2012).

Here, Brown claims his second amended PCRA petition, which is patently untimely on its face,⁶ falls within the statutory exceptions to the PCRA’s one-year time limitation set forth at 42 Pa.C.S. § 9545(b)(1)(i) and (ii).

With regard to Section 9545(b)(1)(i), the governmental interference exception, Brown claims the Commonwealth violated **Brady v. Maryland**, 373 U.S. 83 (1963), by purposely withholding material exculpatory evidence,

⁶ We note that 42 Pa.C.S. § 9543 permits a challenge to a guilty plea where the applicant alleges that his or her plea was “unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.” 42 Pa.C.S. § 9543(a)(2)(iii). This provision, however, is subject to the general PCRA timeliness requirements set forth in 42 Pa.C.S. § 9545.

Generally, a PCRA petition must be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S. § 9545(b)(1). A judgment is deemed final for purposes of the PCRA “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review.” 42 Pa.C.S. § 9545(b)(3). Here, Brown’s judgment of sentence became final on January 17, 2007, upon expiration of the 30-day period for filing a direct appeal from the December 18, 2006, judgment of sentence. Therefore, Brown had until January 17, 2008, to file a timely PCRA petition. Accordingly, the present petition, filed on July 23, 2010, is clearly untimely.

specifically, medical records, regarding the victim, D.D.⁷ **See** Brown's Brief at 32. Brown, however, has failed to show that any exculpatory medical records exist, and an assertion that is merely speculative does not satisfy the exception. **See Commonwealth v. Dickerson**, 900 A.2d 407, 411 (Pa. Super. 2006), *appeal denied*, 911 A.2d 933 (2006) (holding petitioner's assertion regarding **Brady** violation, without proof of **Brady** materials, was speculative and insufficient to support governmental interference exception). Furthermore, even if Brown could show that **Brady** evidence did exist, Brown cannot satisfy the 60-day time limitation for asserting this exception as Brown or his counsel would have been aware from the time of the preliminary hearing or guilty plea hearing that there had been no mention of medical records. **See** 42 Pa.C.S. § 9545(b)(2); **Dickerson**, 900 A.2d at 411. Therefore, we reject Brown's claim that his petition satisfies the governmental interference exception.

Next, with regard to 42 Pa.C.S. § 9545(b)(1)(i), the unknown facts exception, Brown claims:

[O]n or about 06/15/2011, the appellant, Patrick Brown, received newly discovered evidence from his legal wife T.D., the biological mother of L.D., and guardian of D.D., the alleged victims ha[d] come forward and stated to their mother that the accusations were false, this evidence was not available to [Brown], or his attorney at the time of the plea hearing[,] and

⁷ As mentioned above, D.D. is the victim in the case at CP-51-CR-0606161-2006.

this new evidence does satisfy the exception to the time-bar below:

The facts upon which the claim is predicated were unknown to the appellant or his attorney and could not have been ascertained by the exercise of due diligence.

The above mentioned new evidence was presented in an amended PCRA petition filed on 07/11/2011, within 60-days of the date the claims could have been presented. 42 Pa.C.S.A. § 9545(b)(2). ...

Brown's Brief at 40.

In order to satisfy Section 9545(b)(1)(ii), a petitioner must show: (1) the facts upon which the claim was predicated were unknown, and (2) the facts could not have been ascertained by the exercise of due diligence. ***Commonwealth v. Bennett***, 930 A.2d 1264, 1272 (Pa. 2007). Further, the claim must be brought within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2); ***Bennett*** at 1267–1268.

Here, Brown has ostensibly filed the amended second petition in accordance with the 60-day requirement of Section 9545(b)(2), since he alleged that he learned of the information on June 15, 2011, and he filed his petition on July 11, 2011. However, Brown only presented a bald claim that information was provided to him on June 15, 2011, indicating that L.D.⁸ and D.D. informed their mother, T.B., the allegations were not true. **See**

⁸ We note that L.D. is not one of the victims in either CP-51-CR-0605961-2006, or CP-51-CR-0606161-2006, which are the only cases underlying the PCRA petition at issue in this appeal.

Amended PCRA Petition, 7/11/2011, at 4, ¶¶10–11. **See also** Response to Rule 907 Notice, 9/4/2012 at 2, ¶¶2–3. As such, the official record does not contain any explanation of why the alleged evidence could not have been obtained sooner with the exercise of due diligence. **See *Commonwealth v. Monaco***, 996 A.2d 1076, 1080 (Pa. Super. 2010), *appeal denied*, 20 A.3d 1210 (Pa. 2011) (due diligence demands petitioner take reasonable steps to protect own interests and to explain why evidence could not have been obtained sooner). Consequently, because Brown has failed to explain what efforts were taken to learn this information, or why the alleged facts could not have been ascertained earlier with the exercise of due diligence,⁹ Brown’s petition does not satisfy the requirements of Section 9545(b)(1)(ii). **See *Monaco, supra***.

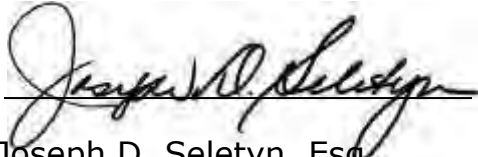
Accordingly, having reviewed the arguments of Brown, and having found that he has failed to satisfy any exception to the PCRA time bar, there is no basis for this Court to disturb the PCRA court’s determination that Brown’s second PCRA petition is untimely. Therefore, we affirm.

Order affirmed. All outstanding motions dismissed.

⁹ Additionally, Brown did not identify the source of this information in his amended second PCRA petition or in his response to the court’s Rule 907 notice. Brown, in his brief submitted to this Court, identifies the source as “his legal wife, T.B.” Brown’s Brief at 40. However, Brown has never produced any certification as to T.B., regarding D.D.’s communication to T.B., or T.B.’s communication to Brown. **See** 42 Pa.C.S § 9545(d) (petitions requesting an evidentiary hearing “shall include a signed certification as to each intended witness”); Pa.R.Crim.P. 902(A)(15) (same).

J-S78017-13

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: 5/19/2014