

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BABE RUTH DAWSON, JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3238 EDA 2013

Appeal from the PCRA Order entered November 22, 2013,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-631411-1991

BEFORE: GANTMAN, P.J., ALLEN, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED JULY 07, 2014

Babe Ruth Dawson, Jr., ("Appellant") appeals *pro se* from the order denying his latest petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46. We affirm.

The pertinent facts and protracted procedural history are as follows: On March 12, 1992, at the conclusion of a two-day bench trial, Appellant was convicted of first-degree murder and related charges. On December 14, 1993, the trial court sentenced Appellant to life in prison for his murder conviction, and a concurrent one to two-year sentence for the remaining convictions. Appellant filed a timely appeal to this Court. In an unpublished memorandum filed on July 5, 1995, this Court affirmed Appellant's judgment of sentence. ***Commonwealth v. Dawson***, 667 A.2d 418 (Pa. Super.

*Former Justice specially assigned to the Superior Court.

1995). On March 18, 1996, our Supreme Court denied Appellant's *allocatur* petition. ***Commonwealth v. Dawson***, 674 A.2d 1066 (Pa. 1996).

Appellant filed a *pro se* PCRA petition on December 31, 1996. However, after learning that his counsel had filed a writ of *habeas corpus* in federal court, Appellant withdrew this petition on April 18, 1997. The federal district court denied Appellant's *habeas corpus* petition on November 3, 1997. ***See Dawson v. Kyler***, F.Supp.2d, 2005 WL 182723 (E.D.Pa. 2005).

Appellant filed another *pro se* PCRA petition on January 5, 1998. Treating this petition as Appellant's first, the PCRA court appointed counsel, PCRA counsel filed an amended petition, and the PCRA court subsequently issued notice of its intent to dismiss. By order entered November 22, 2000, the PCRA court dismissed Appellant's petition as untimely filed. Appellant did not file a timely appeal. On January 22, 2001, following Appellant's filing of another PCRA petition, however, Appellant's appellate rights were restored. In an unpublished memorandum filed on November 27, 2001, this Court affirmed the denial of post-conviction relief. ***Commonwealth v. Dawson***, 792 A.2d 611 (Pa. Super. 2001). On May 20, 2002, our Supreme Court denied Appellant's *allocatur* petition. ***Commonwealth v. Dawson***, 798 A.2d 1287 (Pa. 2002).

On June 3, 2002, Appellant again filed a PCRA petition. On November 25, 2002, after proper notice, the PCRA court dismissed this petition as untimely filed. Appellant filed a timely appeal to this Court. In a judgment order on September 17, 2003, this Court affirmed the denial of post-

conviction relief. **Commonwealth v. Dawson**, 835 A.2d 829 (Pa. Super. 2003). On March 23, 2004, our Supreme Court denied Appellant's *allocatur* petition. **Commonwealth v. Dawson**, 847 A.2d 1278 (Pa. 2004).

On June 16, 2011, Appellant filed the PCRA petition at issue. On October 19, 2011, the PCRA court filed Pa.R.Crim.P. 907 notice of intent to dismiss Appellant's latest petition. Appellant filed a response on November 2, 2011. By order entered October 22, 2013, the PCRA court dismissed Appellant's PCRA petition. This timely appeal followed. The PCRA court did not require Pa.R.A.P. 1295 compliance.

This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. **Commonwealth v. Halley**, 870 A.2d 795, 799 n.2 (Pa. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. **Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001). Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. **Commonwealth v. Jordan**, 772 A.2d 1011 (Pa. Super. 2001). Finally, because this is a serial petition for post-conviction relief, Appellant must meet a more stringent standard. "A second or any subsequent post-conviction request for relief will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a

miscarriage of justice may have occurred.” **Commonwealth v. Burkhardt**, 833 A.2d 233, 236 (Pa. Super. 2003) (*en banc*) (citations omitted). “A petitioner makes a *prima facie* showing if he demonstrates that either the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged.” **Id.**

Before addressing the issues raised on appeal, we must first determine whether Appellant’s PCRA petition was timely. The timeliness of a post-conviction petition is jurisdictional. **Commonwealth v. Albrecht**, 994 A.2d 1091, 1093 (Pa. 2010) (citation omitted). Thus, if a petition is untimely, neither an appellate court nor the PCRA court has jurisdiction over the petition. **Id.** “Without jurisdiction, we simply do not have the legal authority to address the substantive claims” raised in an untimely petition. **Id.**

Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, an exception to the time for filing the petition. **Commonwealth v. Gamboa-Taylor**, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S.A. § 9545(b)(1). Under these exceptions, the petitioner must plead and prove that: “(1) there has been interference by government officials in the presentation of the claim; or (2) there exists after-discovered facts or evidence; or (3) a new constitutional right has been recognized.” **Commonwealth v. Fowler**, 930

A.2d 586, 591 (Pa. Super. 2007) (citations omitted). A PCRA petition invoking one of these statutory exceptions must “be filed within sixty days of the date the claim first could have been presented.” ***Gamboa-Taylor***, 753 A.2d at 783. **See also** 42 Pa.C.S.A. § 9545(b)(2). Moreover, exceptions to the time restrictions of the PCRA must be pled in the petition, and may not be raised for the first time on appeal. ***Commonwealth v. Burton***, 936 A.2d 521, 525 (Pa. Super. 2007); **see also** Pa.R.A.P. 302(a) (“Issues not raised before the lower court are waived and cannot be raised for the first time on appeal.”).

Appellant did not file a petition for *certiorari* following this Court’s affirmance of his judgment of sentence on or about June 17, 1996, after the ninety-day period for requesting such relief expired. **See** 42 Pa.C.S.A. 9543(b)(3); U.S.Sup.Ct.R. 13. Appellant had to file this petition on or about June 17 1997, in order for it to be timely. As Appellant filed the instant petition almost fourteen years later, it is patently untimely unless he has satisfied his burden of pleading and proving that one of the enumerated exceptions applies. **See *Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999).

Within his brief, Appellant first claims that he has met the timeliness exception of a “newly recognized constitutional right,” 42 Pa.C.S.A. section 9545(b)(1)(iii), and references the United State Supreme Court’s decision in ***Melendez-Diaz v. Massachusetts***, 129 S.Ct. 2527 (2009), as well as this

Court's decision in ***Commonwealth v. Barton-Martin***, 5 A.3d 363 (Pa. Super. 2010), and ***Commonwealth v. Dyarman***, 73 A.3d 565 (Pa. 2013).

The PCRA Court rejected Appellant's reliance upon the first two cases because Appellant did not file his latest PCRA petition "within 60 days of either decision." PCRA Court Opinion, 10/22/13, at 3. **See** 42 Pa.C.S.A. section 9545(b)(2), ***supra***. In addition, the PCRA court explained:

Even if this claim were not time-barred, the Pennsylvania Superior Court has held that neither [the] decision of the Superior Court in [***Barton-Martin***], applying the United States Supreme Court's holding in [***Melendez-Diaz***], nor [the] decision in ***Melendez -Diaz*** itself, nor [the] decision in ***Crawford v. Washington***, [U.S. (20)], upon which ***Melendez-Diaz*** relied, applied retroactively to bring untimely petitions within an exception to the statutory time bar. ***Commonwealth v. Brandon***, 51 A.3d 231, 235-36 (Pa. Super. 2012).

Id. at 3, n.5.

Our review of the above cases supports the PCRA court's conclusion that Appellant did not timely raise his claim regarding a newly recognized constitutional right, and, even if he had, he did not meet his burden under subsection 9545(b)(1)(iii). **See generally, *Brandon, supra***.

As noted above, Appellant also cites our Supreme Court's recent decision in ***Dyarman, supra***, to support his claim. In ***Dyarman***, our Supreme Court applied the reasoning of ***Melendez-Diaz*** and ***Crawford*** to determine, in a driving under the influence case, that the defendant's Sixth Amendment confrontation rights were not violated by the admission into

evidence of the pertinent calibration and accuracy certificates for breath test machines. **Dyarmann**, 73 A.2d at 569. Appellant fails to explain how this decision supports him in establishing the recognition of a new constitutional right that is to be applied retroactively.

Appellant also asserts that his latest petition is not time-barred given the United State Supreme Court's recent holding in **Martinez v. Ryan**, 132 S.Ct. 1309 (2012). We disagree. Initially, we note that because Appellant did not raise a claim based upon **Martinez** before the PCRA court, it inappropriately is being raised for the first time on appeal. **See generally**, Pa.R.A.P. 302(a).

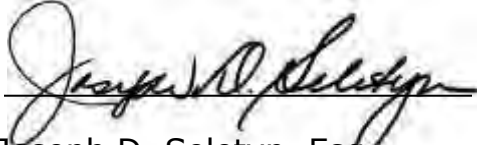
Absent waiver, Appellant's reliance upon **Martinez** is inapposite. This Court has recently held, "While **Martinez** represents a significant development in federal habeas corpus law, it is of no moment with respect to the way Pennsylvania courts apply the plain language of the time bar set forth in section 9545(b)(1) of the PCRA." **Commonwealth v. Saunders**, 60 A.3d. 162, 165 (Pa. Super. 2013).

In sum, our review of the record supports the PCRA court's determination that Appellant's latest PCRA is patently untimely, and Appellant has not met his burden of establishing an exception to the PCRA's time bar. The PCRA court correctly determined that it lacked jurisdiction to address the substantive claims raised by Appellant. **Beasley, supra**. We therefore affirm the PCRA court's order denying Appellant post-conviction relief.

J-S43026-14

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: 7/7/2014