

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JAMES J. BURDEN,	:	
	:	
Appellant	:	No. 3421 EDA 2013

Appeal from the Order Entered November 1, 2013  
In the Court of Common Pleas of Bucks County  
Criminal Division No(s): CP-09-CR-0007263-2007

BEFORE: GANTMAN, P.J., JENKINS, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JUNE 24, 2014**

Appellant, James J. Burden, appeals from the order entered in the Bucks County Court of Common Pleas denying, after a hearing, his first Post Conviction Relief Act<sup>1</sup> ("PCRA") petition. He suggests that despite a negotiated plea bargain for an aggregate sentence of, *inter alia*, twelve to twenty-eight years' imprisonment, the court should have imposed a conditional minimum sentence pursuant to the Recidivism Risk Reduction Incentive Act.<sup>2</sup> His counsel has filed with this Court a **Turner/Finley**<sup>3</sup> letter

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 42 Pa.C.S. §§ 9541-9546.

<sup>2</sup> 61 Pa.C.S. §§ 4501-4512.

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and a petition to withdraw. We affirm and grant counsel's petition to withdraw.

We adopt the facts and procedural history set forth in the trial court's opinion. **See** Trial Ct. Op., 2/25/14, at 1-3. Appellant was sentenced on July 22, 2009. He did not appeal. On October 12, 2012, Appellant filed a motion for modification of sentence *nunc pro tunc*, which the PCRA court construed as a PCRA petition and appointed counsel. After a hearing, the court denied his petition on November 1, 2013, and Appellant filed a timely notice of appeal on Monday, December 2, 2013. Appellant filed a Pa.R.A.P. 1925(b) statement. Before this Court, Appellant's counsel filed a petition to withdraw and a **Turner/Finley** letter and Appellant filed a *pro se* response to counsel's **Turner/Finley** letter.

Appellant's counsel raises the following issues:

Whether the lower court erred when it denied Appellant's post-conviction motion seeking modification of his sentence to include a conditional minimum sentence pursuant to the Recidivism Risk Reduction Incentive Act?

Whether counsel should be permitted to withdraw her appearance . . . when the matter on appeal lacks arguable merit?

Appellant's **Turner/Finley** Brief at 4. Appellant, in his *pro se* response, asserts the following issue: "Whether the lower court was not jurisdictionally

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<sup>3</sup> **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

barred from considering Appellant's post-conviction motion seeking imposition of a RRRRI sentence and PCRA counsel was ineffective by suggesting the lower court was." Appellant's *Pro Se* Response, at 3.

Prior to addressing the issues raised in the **Turner/Finley** brief and Appellant's *pro se* response, we examine the following in evaluating counsel's petition to withdraw:

[I]ndependent review of the record by competent counsel is required before withdrawal is permitted. Such independent review requires proof of:

- 1) A "no-merit" letter by PCRA counsel detailing the nature and extent of his review;
- 2) The "no-merit" letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
- 3) The PCRA counsel's "explanation", in the "no-merit" letter, of why the petitioner's issues were meritless;
- 4) The PCRA court conducting its own independent review of the record; and
- 5) The PCRA court agreeing with counsel that the petition was meritless.

**Commonwealth v. Widgins**, 29 A.3d 816, 817-18 (Pa. Super. 2011)

(alterations and citations omitted). Further, the **Widgins** Court explained:

The Supreme Court [in **Commonwealth v. Pitts**, 981 A.2d 875 (Pa. 2009),] did not expressly overrule the additional requirement imposed by [**Commonwealth v. Friend**, 896 A.2d 607 (Pa. Super. 2006),] decision, *i.e.*, that PCRA counsel seeking to withdraw contemporaneously forward to the petitioner a copy of the application to withdraw that includes (i) a copy of both the "no-merit" letter, and (ii) a statement advising the PCRA petitioner that, in the event the trial court grants the application of

counsel to withdraw, the petitioner has the right to proceed *pro se*, or with the assistance of privately retained counsel.

**Id.** at 818. Instantly, we have reviewed counsel's petition to withdraw and conclude it complies with the requirements set forth by the **Widgins** Court. **See id.** Accordingly, we proceed.

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 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).

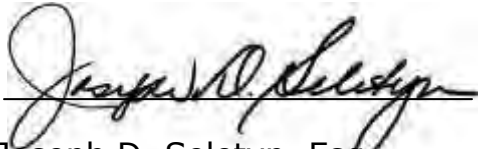
Instantly, we review whether the PCRA court erred by holding Appellant's first PCRA petition was untimely. **See** 42 Pa.C.S. § 9545(b)(1), (2); ***Abu-Jamal***, 941 A.2d at 1267-68. Appellant's judgment of sentence became final on August 21, 2009, as Appellant did not file a notice of appeal to this Court. Appellant filed the instant petition on October 12, 2012, over three years 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.

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In this case, Appellant has not established any of the timeliness exceptions. **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 grant counsel's petition to withdraw and affirm the order below. **See Wilson**, 824 A.2d at 333.

Petition to withdraw granted. 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