NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CASEY HOEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 5 WDA 2014

Appeal from the PCRA Order September 16, 2011
In the Court of Common Pleas of Washington County
Criminal Division at No(s): CP-63-CR-0001236-2002

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and OTT, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JUNE 27, 2014**

Appellant, Casey Hoey, appeals from the order entered in the Washington County Court of Common Pleas, denying his fourth petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

The relevant facts and procedural history of this appeal are as follows. In April 2002, Appellant killed the victim, beating her with a tire iron and stabbing her with a knife. On March 26, 2003, Appellant pled guilty to first degree murder and theft by unlawful taking. That same day, the court sentenced Appellant to life imprisonment without parole for the murder conviction. The court imposed no further penalty for the theft conviction. Appellant did not pursue a direct appeal.

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[1] 42 Pa.C.S.A. §§ 9541-9546.

On October 24, 2006, Appellant filed a *pro se* PCRA petition. The court appointed counsel, who filed a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (1988) (*en banc*). The court denied PCRA relief on April 5, 2007, and Appellant did not seek further review. Between 2007 and 2011, Appellant filed two more unsuccessful PCRA petitions.

On May 19, 2011, private counsel filed a serial PCRA petition on Appellant's behalf ("fourth petition").[2] In it, Appellant alleged the Commonwealth unlawfully induced his guilty plea based on "inaccurate evidence" obtained from Marlous Johnson, Sr., a fellow inmate at Washington County Jail. (PCRA Petition, filed 5/19/11, at 2). Appellant asserted:

> b. That on March 21, 2011, Marlous Johnson, Sr. admitted that [the] former District Attorney [of Washington County] instructed him to obtain incriminating information against [Appellant].
>
> c. That Mr. Johnson further admitted that he did obtain incriminating information against [Appellant] and submitted that information to the District Attorney's Office.

(***Id.***) Appellant claimed he did not did not discover these facts until March 21, 2011, when his private investigator interviewed Mr. Johnson. Appellant

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[2] Sometime after the filing of the PCRA petition, Appellant fired private counsel and elected to proceed *pro se*.

asked the court to consider his petition timely filed and grant an evidentiary hearing. On August 16, 2011, the court issued notice of its intent to dismiss the petition without a hearing, pursuant to Pa.R.Crim.P. 907. On August 29, 2011, Appellant filed a *pro se* response to the Rule 907 notice. The court dismissed Appellant's fourth petition on September 21, 2011.

On October 5, 2011, Appellant timely filed a *pro se* notice of appeal and motion to proceed *in forma pauperis* ("IFP"). Although the clerk of courts docketed Appellant's filings and stamped them as "filed" on October 5, 2011, the clerk of courts did not transmit a copy of the notice of appeal to this Court. On October 13, 2011, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a *pro se* Rule 1925(b) statement on October 24, 2011.

The parties took no further action until June 11, 2012, when Appellant sent a letter to the PCRA court inquiring about the status of his appeal. Appellant sent a second letter to the court on July 23, 2012. On August 3, 2012, Appellant filed another *pro se* PCRA petition ("fifth petition"). That same day, the court granted Appellant's motion to proceed IFP on appeal from the dismissal of the fourth petition. On September 19, 2012, Appellant filed a *pro se* motion to discontinue the appeal. The court, however, did not rule on the motion. On September 20, 2012, the matter was assigned to a new jurist. In April 2013, the new jurist ordered Appellant to file an

amendment to his fifth petition. Initially, Appellant responded by filing another *pro se* motion to discontinue the appeal from the dismissal of the fourth petition. Again, the court did not rule on the motion. Appellant subsequently filed a *pro se* amendment to the fifth petition.

On April 15, 2013, Appellant filed a *pro se* correspondence with this Court, inquiring about the status of the appeal from the dismissal of the fourth petition. On April 19, 2013, this Court entered an order stating that Appellant did not have a pending appeal. To the extent Appellant had filed a notice of appeal, this Court directed the PCRA court to "transmit [Appellant's] notice of appeal to this Court forthwith." (Order, entered 4/19/13, at 1). The PCRA court did not respond to this Court's order. On December 18, 2013, Appellant filed a *pro se* application to compel with this Court, which included a copy of the October 5, 2011 *pro se* notice of appeal. Consequently, this Court issued the following order:

> Upon consideration of [Appellant's] December 15, 2013 letter addressed to the prothonotary of this Court, docketed by the prothonotary as a December 18, 2013 "Application to Compel," wherein Appellant alleges that the clerk of courts has not transferred his Notice of Appeal to this Court, the following is **ORDERED**: the instant "application" with the included copy of Appellant's Notice of Appeal, which Appellant transmitted to this Court with the instant "application," is **TRANSFERRED** to the clerk of courts for the Court of Common Pleas of Washington County for processing as a Notice of Appeal.
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> * * *

(Order, entered 12/23/13, at 1).

Despite contacting this Court, Appellant also filed a *pro se* correspondence with the PCRA court on December 23, 2013. The correspondence included another copy of the October 5, 2011 *pro se* notice of appeal, as well as a letter asking the clerk of courts to forward the copy of the notice of appeal to the Superior Court.[3] The clerk of courts docketed Appellant's filings and stamped them as "filed" on December 23, 2013. On January 31, 2014, the PCRA court transmitted the certified record to this Court.

Initially, we must address the timeliness of Appellant's appeal, where Pennsylvania Rule of Appellate Procedure 903 provides: "Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). The notice of appeal shall be filed with the clerk of the trial court; "[u]pon receipt of the notice of appeal the clerk shall immediately stamp it with the date of receipt, and that date shall constitute the date when the appeal was taken, which date shall be shown on the docket." Pa.R.A.P. 905(a)(3). "The clerk shall immediately transmit to the prothonotary of the appellate court named in the notice of appeal a copy of the notice of appeal showing the date of receipt, the related

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[3] Appellant dated the letter December 15, 2013. Thus, Appellant was unaware of this Court's December 23, 2013 order when he contacted the PCRA court.

proof of service and a receipt showing collection of any docketing fee in the appellate court…." Pa.R.A.P. 905(b).

Time limitations for taking appeals are strictly construed and cannot be extended as a matter of grace. ***Commonwealth v. Valentine***, 928 A.2d 346 (Pa.Super. 2007). This Court can raise the matter *sua sponte*, as the issue is one of jurisdiction to entertain the appeal. ***Id.*** This Court has no jurisdiction to entertain an untimely appeal. ***Commonwealth v. Patterson***, 940 A.2d 493 (Pa.Super. 2007), *appeal denied*, 599 Pa. 691, 960 A.2d 838 (2008). Generally, an appellate court may not enlarge the time for filing a notice of appeal. Pa.R.A.P. 105(b). Extension of the filing period is permitted only in extraordinary circumstances, such as fraud or some breakdown in the court's operation. ***Commonwealth v. Braykovich***, 664 A.2d 133 (Pa.Super. 1995), appeal denied, 544 Pa. 622, 675 A.2d 1242 (1996).

Instantly, the court dismissed Appellant's fourth petition on September 21, 2011, and Appellant timely filed a *pro se* notice of appeal on October 5, 2011. The certified record confirms that the clerk of courts docketed Appellant's notice of appeal on October 5, 2011, but the clerk of courts did not transmit a copy of the notice of appeal to this Court. Ultimately, this Court learned about the *pro se* notice of appeal through Appellant's *pro se* correspondence in 2013. On December 23, 2013, this Court transferred Appellant's *pro se* correspondence for processing as a notice of appeal. That

same day, Appellant submitted *pro se* filings to the PCRA court, including a handwritten copy of the October 5, 2011 *pro se* notice of appeal.

The PCRA court treated Appellant's December 23, 2013 filing as an untimely notice of appeal from the September 21, 2011 order dismissing the fourth petition. The PCRA court concluded, "[A]ny complaint raised by…Appellant in this appeal is waived and the appeal should be quashed." (***See*** PCRA Court Opinion, filed January 31, 2014, at 3.) The PCRA court, however, also acknowledged that Appellant timely filed a *pro se* notice of appeal on October 5, 2011, which "was never processed as an appeal by the Washington County Clerk of Courts." (***Id.*** at 2). On this record, a breakdown in the operations of the PCRA court caused this Court's delay in considering Appellant's otherwise timely appeal from the order dismissing his fourth petition. ***See Patterson, supra***. Therefore, we decline to adopt the PCRA court's conclusion that the current appeal must be quashed as untimely.

Appellant now raises the following issues for our review:

> DID THE PCRA COURT ERR BY CONCLUDING THAT APPELLANT'S LATEST PCRA PETITION(S) WERE UNTIMELY, AND WHOLLY WITHOUT MERIT?
>
> WAS/IS THE PROSECUTOR/TRIAL COURT/AND DEFENSE COUNSEL UNQUESTIONABLY REQUIRED TO DISCLOSE EXCULPATORY/IMPEACHMENT EVIDENCE FAVORABLE TO APPELLANT AT ANY AND ALL TIMES?
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> WAS APPELLANT'S MARCH 26, 2003 GUILTY PLEA UNLAWFULLY INDUCED, WHERE THE CIRCUMSTANCES MAKE IT LIKELY THAT THE INDUCEMENT CAUSED

> APPELLANT TO PLEAD GUILTY AND APPELLANT IS FACTUALLY INNOCENT—IN VIOLATION OF STATE AND FEDERAL LAWS/AND CONSTITUTIONS?
>
> DID THE PCRA COURT HAVE LEGAL/CONSTITUTIONAL "SUBJECT MATTER JURISDICTION" POWER AND AUTHORITY TO PROSECUTE…AND IMPRISON APPELLANT?
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> WAS THE PCRA COURT REQUIRED TO HOLD AN EVIDENTIARY HEARING AND PROVIDE PCRA RELIEF…?

(Appellant's Brief at 5).

As an additional preliminary matter, we must determine whether Appellant timely filed his current PCRA petition. ***Commonwealth v. Harris***, 972 A.2d 1196 (Pa.Super. 2009), *appeal denied*, 603 Pa. 684, 982 A.2d 1227 (2009). Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. ***Commonwealth v. Robinson***, 575 Pa. 500, 837 A.2d 1157 (2003). The most recent amendments to the PCRA, effective January 16, 1996, provide that a PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1); ***Commonwealth v. Bretz***, 830 A.2d 1273 (Pa.Super. 2003). A judgment is deemed final "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 the review." 42 Pa.C.S.A. § 9545(b)(3).

The three statutory exceptions to the timeliness provisions in the PCRA allow for very limited circumstances under which the late filing of a petition will be excused. 42 Pa.C.S.A. § 9545(b)(1). To invoke an exception, the

petition must allege and the petitioner must prove:

> (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.A. § 9545(b)(1)(i)-(iii). "As such, when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." ***Commonwealth v. Gamboa-Taylor***, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Instantly, the court sentenced Appellant on March 26, 2003. Appellant did not seek further review with this Court. Therefore, Appellant's judgment of sentence became final on April 25, 2003. ***See*** 42 Pa.C.S.A. § 9545(b)(3). Appellant filed his fourth PCRA petition on May 19, 2011, over eight years after his judgment of sentence became final. Thus, Appellant's current prayer for relief was patently untimely.

In his first issue, Appellant attempts to invoke an exception to the time restrictions of the PCRA, arguing the facts upon which his claim is based were unknown to him and could not have been ascertained by the exercise of due diligence. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(ii). Appellant asserts he has petitioned the Commonwealth since 2002, seeking the disclosure of any informants who provided evidence against him. Appellant claims the Commonwealth denied his requests and purposefully withheld favorable and exculpatory evidence. Appellant contends a family member saved enough money to hire a private investigator in 2011. Appellant asserts the investigator discovered Mr. Johnson and interviewed him on March 21, 2011. Appellant insists Mr. Johnson detailed his role as an informant who provided evidence against Appellant in exchange for favorable treatment from the Commonwealth. Appellant maintains Mr. Johnson would testify that the Commonwealth "framed" Appellant for the offense of first degree murder. On this basis, Appellant concludes this Court must vacate the order denying PCRA relief and remand the matter for an evidentiary hearing. We disagree.

The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence. ***Commonwealth v. Bennett***, 593 Pa. 382, 930 A.2d 1264 (2007).

> Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must

> explain why he could not have obtained the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced.

Commonwealth v. Monaco, 996 A.2d 1076, 1080 (Pa.Super. 2010), *appeal denied*, 610 Pa. 607, 20 A.3d 1210 (2011) (internal citations omitted).

Instantly, Appellant's PCRA filings included a transcript of his investigator's interview with Mr. Johnson. The transcript, however, does not contain any type of certificate verifying its authenticity. In it, Mr. Johnson admitted that he acted as an informant for the Commonwealth on Appellant's case. Nevertheless, Mr. Johnson's statements do not actually exculpate Appellant. Mr. Johnson recounted his jailhouse conversations with Appellant as follows:

> [INVESTIGATOR]: Can you tell me specifically what [Appellant] told you, and how many times you met with him?
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> [MR. JOHNSON]: I met with him probably four or five times at least, six maybe.
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> [INVESTIGATOR]: In the library?
>
> [MR. JOHNSON]: Yeah.
>
> [INVESTIGATOR]: Ok, and what was discussed, what did he request from you…and what did, did he tell you anything about the case?
>
> [MR. JOHNSON]: The only things that he did say was…he did it, but it wasn't the way they played it out to be.
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> [INVESTIGATOR]: Can you explain that?

> [MR. JOHNSON]: He's…well, basically what he was saying is that there was more to it [than] what they were, they were putting things in their own words. You know what I mean. Yeah, it happened, but not like they said it happened.
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> * * *
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> [INVESTIGATOR]: Ok now why do you feel [Appellant] had got a bad deal?
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> [MR. JOHNSON]: Because sometimes people do things after they're provoked, you know what I mean. Drugs [are] not an excuse, but, sometimes you got to see what happened that led on, after the, after, after the drinking…you know and I just, like I said…I think he was provoked into doing what he was doing…you know. And (pause) it's not like he shouldn't [have] got some time, I mean…he should [have] got some time, but the man didn't deserve life.
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> * * *

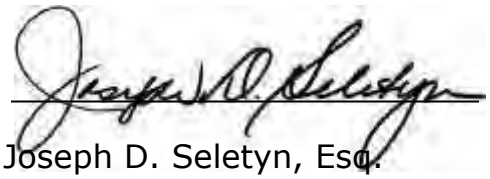
(***See*** Transcript, filed 8/3/12, unnumbered).

Contrary to Appellant's assertions, the information from Mr. Johnson does not demonstrate that the Commonwealth offered false evidence against Appellant during the plea proceedings. Rather, Mr. Johnson's statements amount to nothing more than his opinion on the type of criminal homicide at issue. Additionally, Appellant's PCRA petition and appellate brief failed to explain adequately why Mr. Johnson's statements could not have been obtained earlier through the exercise of due diligence. Therefore, Appellant is unable to satisfy the after-discovered fact exception to the PCRA timeliness requirements. ***See Commonwealth v. Priovolos***, 746 A.2d 621

(Pa.Super. 2000), *appeal denied*, 563 Pa. 643, 758 A.2d 1198 (2000) (holding petitioner failed to succeed in invoking newly-discovered fact exception, because petitioner made no attempt to explain why information contained in affidavits could not have been obtained earlier with exercise of due diligence). Accordingly, Appellant's PCRA petition remains time-barred. ***See Bretz, supra***; 42 Pa.C.S.A. § 9545(b)(1). Accordingly, we affirm.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/27/2014