NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TYRONE TATE GREEN	:	
Appellant	:	No. 3569 EDA 2017

Appeal from the PCRA Order October 16, 2017
In the Court of Common Pleas of Chester County Criminal Division at No(s): CP-15-CR-0000028-1994

BEFORE: BOWES, J., OLSON, J., and NICHOLS, J.

MEMORANDUM BY BOWES, J.: **FILED MAY 25, 2018**

Tyrone Tate Green appeals from the dismissal of his seventh PCRA petition as untimely. We affirm.

On July 20, 1996, a jury convicted Appellant of recklessly endangering another person, possessing an instrument of crime, and firearms not to be carried without a license in connection with Appellant's role in a December 18, 1993 robbery and homicide at a laundromat in Coatesville, Pennsylvania. Although a jury was initially unable to reach a verdict on second degree murder and robbery, Appellant was subsequently retried on those offenses and convicted.

On March 12, 1997, the trial court sentenced Appellant to life imprisonment for murder and imposed an aggregate term of three to seven years imprisonment on the remaining offenses. We affirmed the judgment

of sentence on December 31, 1997, and our Supreme Court denied allowance of appeal on June 8, 1998. ***Commonwealth v. Green***, 706 A.2d 1252 (Pa.Super. 1997) (unpublished memorandum), *appeal denied*, 724 A.2d 936 (Pa. 1998). Appellant timely filed a PCRA petition, the trial court denied relief, we affirmed, and our Supreme Court denied allowance of appeal. ***Commonwealth v. Green***, 816 A.2d 328 (Pa.Super. 2002) (unpublished memorandum), *appeal denied*, 839 A.2d 351 (Pa. 2003). On November 28, 2005, the United States Supreme Court denied Appellant's petition for writ of *certiorari*. ***Green v. Brooks***, 546 U.S. 1037 (2005).

On January 5, 2006, Appellant filed his second PCRA petition invoking, *inter alia*, a newly-discovered fact in the form of a disclosure by a fellow prisoner, Shawn Smith, regarding Tyrone Allen, who testified for the Commonwealth at the trial for Appellant's co-defendant. According to Smith, Mr. Allen had informed police that Appellant left the laundromat prior to the murder. The PCRA court dismissed the petition as untimely filed without exception to the time-bar, and we affirmed. Specifically, we reasoned that Appellant could not establish due diligence because Allen testified at the co-defendant's trial "three years prior to Appellant's second trial and twelve years prior to the filing of the instant PCRA petition . . . [and] Allen testified to having seen Appellant leave the laundromat shortly before shots were fired." ***Commonwealth v. Green***, 928 A.2d 1122 (Pa. Super. 2007) (unpublished memorandum at 5) (internal citations omitted).

Hence, we concluded "[t]he information therefore was available and could have been obtained by due diligence, but was not." ***Id***. at 6.

Between 2007 and 2016, Appellant filed four more unsuccessful PCRA petitions. Thereafter, on May 26, 2017, Appellant filed the current PCRA petition, his seventh. Appellant sought to revive his newly-discovered-fact claim in light of ***Commonwealth v. Burton***, 158 A.3d 618 (Pa. 2017), wherein our Supreme Court held that incarcerated *pro se* PCRA petitioners cannot be presumed to know information that is public record for the purpose of determining whether a fact is "previously unknown" under 42 Pa.C.S. § 9545(b)(1)(ii). Following proper notice pursuant to Pa.R.Crim.P. 907, the PCRA court dismissed the petition as untimely. This timely appeal followed.

Appellant presents the following questions for our review:

> I. Whether the PCRA court erred as a matter of law/or abused its discretion in dismisssing[sic] Appellant's . . . petition for post-conviction relief without a hearing?
>
> II. Whether the Pennsylvania Supreme Court clarification of existing PCRA rights and procedures excape[sic] the presumption against retroactive application?
>
> III. Whether the fact that the exculpatory evidence was of public record prior to trial and that Appellant was represented by counsel at trial precludes him from PCRA relief under ***Burton***?
>
> IV. Whether the exculpatory evidence was unknown to Appellant?

> V. Whether Appellant is entitled to a new trial based upon the prosecutions non-disclosure and withholding of exculpatory evidence by [the] Commonwealth['s] key witness Tyrone Allen?
>
> Vi. Miscarriage of justice?

Appellant's brief at 5.

Our scope and standard of review of decisions denying relief pursuant to the PCRA is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error. ***Commonwealth v. Chmiel***, 173 A.3d 617, 624 (Pa. 2017). Our review of questions of law is *de novo*. ***Id***. at 625.

It is well-settled that a PCRA petition, including a subsequent or serial petition, must be filed within one year of the date that a defendant's judgment of sentence became final, unless an exception to the one-year statutory time bar applies. 42 Pa.C.S. § 9545(b)(1). This time restriction is jurisdictional in nature. Whether a petition is timely is a matter of law. ***Commonwealth v. Hudson***, 156 A.3d 1194, 1197 (Pa.Super. 2017).

Appellant concedes that his petition is facially untimely. When a petition is untimely, the petitioner must plead and prove that one of the statutory exceptions applies. ***Id***. If no exception applies, then the petition must be dismissed, as we do not have jurisdiction to consider the merits of the appeal. ***Id***. The PCRA reads, in pertinent part:

> (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 of sentence 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 the government officials with the presentation of the claim in violation of the Constitution or law 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) and (2).

Instantly, Appellant claims that the PCRA court erred in dismissing his petition as untimely because he pled and proved that he is entitled to relief pursuant to § 9545(b)(1)(i)-(iii). He asserts that he filed the instant petition on May 26, 2017, within sixty days of the Supreme Court's decision in ***Burton***, ***supra***, which the Court decided on March 28, 2017. Appellant purports to invoke ***Burton*** as a basis to assert all three of the statutory exceptions to the PCRA time bar. In reality, however, all of his arguments flow from Mr. Allen's purported statements during co-defendant Hall's trial in 1994. Regardless of how Appellant phrases his claims, his reliance upon our Supreme Court's holding in ***Burton*** is unavailing.

First, ***Burton*** does not establish an exception under 42 Pa.C.S. § 9545(b)(1)(iii). Plainly, the ***Burton*** Court did not recognize a retroactively applied new constitutional right. Indeed, the ***Burton*** Court merely engaged in an exercise of statutory construction to clarify whether the public record presumption, *i.e.*, the imputed awareness of information in the public discourse, would apply to an incarcerated *pro se* PCRA petitioner. While prior cases applied that presumption indiscriminately, the High Court concluded that it is not reasonable to apply it to *pro se* petitioners who are incarcerated and ostensibly lack access to public information. ***Id***. at 638 ("[W]e hold that the presumption that information which is of public record cannot be deemed "unknown" for purposes of subsection 9545(b)(1)(ii) does not apply to *pro se* prisoner petitioners."). Hence, having explained the desired application of the newly-discovered-fact exception to the PCRA time requirement, the ***Burton*** Court neither recognized a new constitutional right nor sought to apply any rights retroactively.

Next, we observe that Appellant's assertion regarding the government interference exception is fatally underdeveloped. Appellant argues that the government interfered with the presentation of a timely PCRA petition because it precluded Mr. Allen from testifying at Appellant's trials during the mid-1990. Appellant's brief at 24. Appellant does not explain the nexus between the two events, provide any legal argument, or cite relevant legal authority to support his position. Hence, it is waived. ***Commonwealth v.***

Gould, 912 A.2d 869, 873 (Pa.Super. 2006). ("An appellate brief must provide citations to the record and to any relevant supporting authority. The court will not become the counsel for an appellant and will not, therefore, consider issues which are not fully developed[.]").

Moreover, presuming that Appellant was attempting to argue that he discovered the alleged governmental interference during 2005, when Mr. Smith first revealed Mr. Allen's statements, and assuming *arguendo* that Appellant presented an adequate argument to support that position, Appellant's claim would fail for the identical reason as his newly-discovered-fact exception pursuant to § 9545(b)(1)(ii). In short, Appellant failed to establish that the information could not have been ascertained with due diligence.

The newly-discovered-facts exception requires that a petitioner allege and prove: 1) "the facts upon which the claim is predicated were unknown to the petitioner[;] and 2) could not have been ascertained by the exercise of due diligence." 42 Pa.C.S. § 9545(b)(1)(ii). As noted, *infra*, the ***Burton*** Court held that the public disclosure of a fact would not preclude an incarcerated prisoner from establishing the first prong of the test, *i.e.*, that the facts were unknown. ***Burton***, ***supra*** at 638. However, that case provides no basis for relief because Appellant's failures stem from the lack of due diligence rather than the presumed knowledge of a public record.

Recall that Appellant asserted the identical claim unsuccessfully in his second PCRA petition. As noted, the ***Burton*** Court's decision did not alter the quality of the previously rejected claim. Accordingly, the instant attempt to invoke a newly-discovered fact based upon Mr. Allen's testimony fails for the same reason. In affirming the dismissal of Appellant's second PCRA petition, we explained,

> The newly discovered evidence exception requires the petitioner to allege and prove that the information referred to was "unknown by the petitioner and could not have been ascertained by the exercise of due diligence." 42 Pa.C.S.A. §9545(b)(1)(ii). Allen's testimony had been given in October of 1994, three years prior to Appellant's second trial and twelve years prior to the filing of the instant PCRA petition. During Hall's trial[,] **Allen testified to having seen Appellant leave the laundromat shortly before shots were fired**. The information therefore was available and could have been obtained by due diligence, but was not. Moreover, Appellant provides nothing to support his corollary claim that the prosecutor's interference prevented disclosure of the transcript to his defense attorney. Neither the claim nor its adjunct qualifies as newly-discovered evidence so as to provide an exception to the PCRA time bar. We are thus without jurisdiction to address Appellant's claims.

Green, ***supra*** (unpublished memorandum at 5) (internal citations omitted).

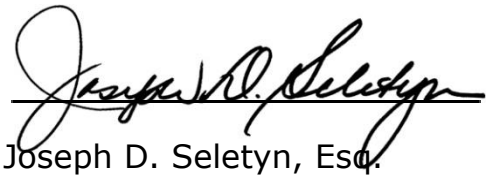
Hence, as we previously stated, the exculpatory evidence that Appellant relies upon at this juncture has been available to him and his counsel since 1994, when Mr. Allen testified at the co-defendant's trial. Appellant could have obtained Mr. Allen's testimony, as well as information regarding the any prosecutorial interference, by exercising due diligence at

that time. He did not. The ***Burton*** Court's discussion of the public record presumption does not negate Appellant's lack of due diligence.

Having found that Appellant's seventh PCRA petition was untimely filed and that no exceptions to the statutory time bar apply, we affirm the order dismissing his petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/25/18