NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DREW COLEMAN,	:	
	:	
Appellant	:	No. 3228 EDA 2018

Appeal from the PCRA Order Entered October 16, 2018
in the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0811271-2004

BEFORE: BOWES, J., SHOGAN, J. and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.: **FILED OCTOBER 03, 2019**

Drew Coleman (Appellant) appeals *pro se* from the October 16, 2018 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Upon review, we affirm.

We begin with the PCRA court's summary of the factual and procedural history.

> On April 12, 2003, Justin Alls and Bruce Garrick were in a minor car accident. After the accident, Alls demanded that Garrick pay for the damage, at which time a fight ensued which left Garrick bruised. After the altercation, Garrick went to Yannie's bar to ask his friends for some money to pay for the damage to the car. After seeing the bruises on Garrick, [Appellant] and co-defendants decided that they would teach Alls a lesson. Co-defendant Kennedy was given the keys to [Appellant's] car and took a gun out from the driver's side, walked up to Alls[,] and shot him. [Appellant] and another co-conspirator then picked up Kennedy in the car and drove away. Alls subsequently died from gunshot wounds to his head and right leg.

* Retired Senior Judge assigned to the Superior Court.

> [Appellant] was represented at trial by Barbara McDermott before the Honorable Carolyn Temin. On November 1, 2006, the jury found [Appellant] guilty of first-degree murder, criminal conspiracy, and possessing an instrument of crime. [Appellant] was subsequently sentenced to life in prison. [Appellant] filed an appeal with the Pennsylvania Superior Court. The Superior Court affirmed judgment of sentence on July 30, 2008. The Pennsylvania Supreme Court denied *allocatur* on December 31, 2008. On March 4, 2010, [Appellant] filed his first PCRA alleging ineffective assistance of counsel. This PCRA [petition] was ultimately dismissed. The Superior Court affirmed the PCRA dismissal and the Pennsylvania Supreme Court denied *allocatur* on August 7, 2012. On February 4, 2014, [Appellant] filed his second PCRA petition. His second petition was dismissed as untimely and the PCRA court's dismissal was again affirmed on appeal to the Pennsylvania Superior Court.
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> On August 22, 2016, [Appellant] filed his third PCRA [petition], the instant petition, alleging [claims of] after-discovered evidence and [prosecutorial misconduct due to a ***Brady***[1] violation. Appellant asserted that his petition, although filed untimely, met the governmental-interference exception to the PCRA's time-bar. *Pro se* PCRA Petition, 8/22/2016, at 7.] He subsequently filed numerous supplemental and amended *pro se* petitions[, ultimately asserting all three exceptions. ***See*** Memorandum of Law, 9/19/2016, at 4-5.] On March 9, 2017, the Honorable Tracy Brandeis-Roman sent [Appellant] a [Pa.R.Crim.P.] 907 notice of intent to dismiss. [Appellant] filed a reply[] on March 28, 2017, alleging that the Pennsylvania Supreme Court's decision in ***Commonwealth v. Burton***, 158 A.3d 618 (Pa. 2017)[2] applied to his current PCRA [petition]

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[1] ***Brady v. Maryland***, 373 U.S. 83 (1963). "Under ***Brady***[] and subsequent decisional law, a prosecutor has an obligation to disclose all exculpatory information material to the guilt or punishment of an accused, including evidence of an impeachment nature." ***Commonwealth v. Spotz***, 47 A.3d 63, 84 (Pa. 2012).

[2] In ***Burton***, our Supreme Court held that "the presumption that information which is of public record cannot be deemed 'unknown' for purposes of [the newly-discovered facts exception to the PCRA's time-bar] **does not apply** to *pro se* prisoner petitioners." 158 A.3d at 638 (emphasis in original).

> because no public record presumption applied to him. Subsequently, this matter was administratively reassigned []. On September 17, 2018, the PCRA court sent [Appellant another] notice of intent to dismiss, indicating that his petition would be dismissed based upon untimeliness. On October 16, 2018, [the PCRA] court dismissed [Appellant's] petition without a hearing based on untimeliness.

PCRA Court Opinion, 3/4/2019, at 1-3 (unnecessary capitalization omitted).

Appellant *pro se* timely filed a notice of appeal.[3] On appeal, Appellant presents one issue for our review: whether the PCRA court erred in dismissing his PCRA petition as untimely and without merit. Appellant's Brief at 1.

"The question of whether a [PCRA] petition is timely [filed] raises a question of law. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review [is] plenary." ***Commonwealth v. Brown***, 141 A.3d 491, 499 (Pa. Super. 2016). Any PCRA petition, including second and subsequent petitions, must either (1) be filed within one year of the judgment of sentence becoming final, or (2) plead and prove a timeliness exception. 42 Pa.C.S. § 9545(b). Furthermore, the petition "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2).[4]

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[3] Both Appellant and the PCRA court complied with Pa.R.A.P. 1925.

[4] This subsection was recently amended, effective December 24, 2018, to extend the time for filing from 60 days of the date the claim could have been presented to one year. However, this amendment does not apply to
(Footnote Continued Next Page)

"For purposes of [the PCRA], a judgment [of sentence] becomes 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. § 9545(b)(3). Here, Appellant's judgment of sentence became final on March 31, 2009, following the expiration of time for seeking review before the United States Supreme Court. Appellant had one year, or until March 31, 2010, to file timely a PCRA petition. Thus, Appellant's 2016 petition was facially untimely, and he was required to plead and prove an exception to the timeliness requirements. The exceptions provide as follows.

> (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.

(Footnote Continued) ———————

Appellant's PCRA petition because it was filed prior to the amendment's effective date.

42 Pa.C.S. § 9545(b)(1)(i-iii).

As noted *supra*, Appellant attempted to plead the governmental-interference exception in his initial petition, and all three exceptions in his amended petitions,[5] based on the Commonwealth's misleading Appellant into believing Commonwealth witness Eugene White did not receive a deal for early parole in exchange for his testimony. ***See*** Memorandum of Law, 9/19/2016, at 4-5. On appeal, Appellant solely claims that he satisfied the newly-discovered facts exception. Appellant's Brief at 6.

To qualify for the newly-discovered facts exception to the PCRA's time-bar, "a petitioner need only establish that the facts upon which the claim is based were unknown to him and could not have been ascertained by the exercise of due diligence." ***Burton***, 158 A.3d at 629 (citations omitted). "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." ***Commonwealth***

[5] Arguably, Appellant has waived any timeliness exception claim except for the governmental-interference exception because "[o]ur Supreme Court 'has condemned the unauthorized filing of supplements and amendments to PCRA petitions, and held that claims raised in such supplements are subject to waiver." ***Commonwealth v. Brown***, 141 A.3d 491, 504 (Pa. Super. 2016) (quoting ***Commonwealth v. Reid,*** 99 A.3d 470, 484 (Pa. 2014)). However, this Court, sitting *en banc*, recently held that "PCRA courts are not jurisdictionally barred from considering multiple PCRA petitions relating to the same judgment of sentence at the same time unless the PCRA court's order regarding a previously filed petition is on appeal and, therefore, not yet final." ***Commonwealth v. Montgomery***, 181 A.3d 359, 365 (Pa. Super. 2018) (*en banc*). Therefore, we decline to find waiver here.

v. Monaco, 996 A.2d 1076, 1080 (Pa. Super. 2010) (citations omitted). "The focus of the exception is on [the] newly discovered **facts**, not on a newly discovered or newly willing source for previously known facts." ***Commonwealth v. Lambert***, 57 A.3d 645, 648-49 (Pa. Super. 2012) (citation omitted; emphasis in original). With regard to a ***Brady*** violation, "[t]he newly-discovered [facts] exception requires that the facts upon which the ***Brady*** claim is predicated were not previously known to the petitioner and could not have been ascertained through due diligence." ***Commonwealth v. Hawkins***, 953 A.2d 1248, 1253 (Pa. 2006).

On appeal, Appellant acknowledges that he became aware of the alleged newly-discovered fact during his jury trial. Appellant further concedes that documents were introduced into evidence pertaining to a purported deal between the Commonwealth and White during trial, and both an assistant district attorney (ADA) and White were called to explain the documents and testify to whether a deal existed. Appellant's Brief at 9-10. Nonetheless, Appellant maintains that he was "unaware of the true outcome of [White's] petition and parole until June of 2016" when his mother requested White's public docket because the ADA and White lied, and the Commonwealth withheld information regarding the alleged deal. ***Id.*** at 11.

The PCRA court found that Appellant had failed to prove the newly-discovered facts exception, explaining that "the issue of whether or not a deal existed was extensively litigated at trial. Not only did defense counsel

question White about the 'deal' but the Commonwealth actually brought in ADA Mark Gilson to testify as to whether or not a deal existed." PCRA Court Opinion, 3/4/2019, at 5-6. The trial court determined that whether or not a deal existed was a question of fact for the jury to decide. ***Id.*** at 6 (citing N.T., 10/26/2006, at 145). As such, the jury was made aware of a letter ADA Gilson had written indicating that no deal had been made, but that White's paroling judge, in his own discretion, could consider White's cooperation with the District Attorney's Office in determining whether to grant early parole. The PCRA court concluded that "the jury was made aware of the extent of any deal and it was up to them to decide if this was indeed a motive for White to lie at trial." PCRA Court Opinion at 8. As such, the PCRA court found that Appellant's "assertion that he did not learn of White's motivation to testify until his mother happened upon White's parole documents in 2016 is patently false[, finding the information was] not newly-discovered and was known to [Appellant] at trial." PCRA Court Opinion at 8 (footnotes omitted).

Upon review, we discern no error in the PCRA court's conclusions. It is apparent from the record that Appellant was aware of a potential deal between White and the Commonwealth during his trial, and whether or not such a deal existed was extensively litigated at trial and left to the jury to decide. Additionally, we conclude that Appellant's reliance on ***Burton*** is misplaced. As noted *supra*, the holding in ***Burton*** was that "the

presumption that information which is of public record cannot be deemed 'unknown' for purposes of [the newly-discovered facts exception to the PCRA's time-bar] does not apply to *pro se* prisoner petitioners." 158 A.3d at 638 (emphasis omitted). However, Appellant's failure to prove the newly-discovered facts exception is not due to any presumption regarding Appellant's knowledge of White's docket sheet as a matter of public record. Appellant failed to prove this exception, rather, because Appellant became aware of the underlying information during trial, and it is well-established that the acquisition **of a new source** for the **same information** does not create a newly-discovered fact for purposes of the PCRA's exception to the time-bar. ***See Lambert, supra***.

Based on the foregoing, Appellant's petition is patently untimely, and he has failed to plead and prove an exception to the PCRA's time-bar. Thus, we conclude that the PCRA court's dismissal of Appellant's PCRA petition was proper and, accordingly, affirm the PCRA court's October 16, 2018 order.[6] Because neither the PCRA court nor this Court has jurisdiction to consider the merits of claims raised in an untimely PCRA petition, we do not reach Appellant's remaining issue on appeal regarding the merits of his PCRA claim.

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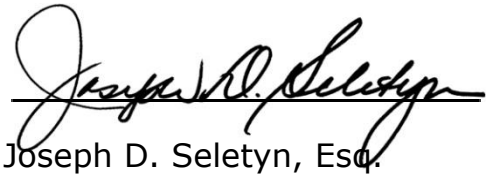
[6] Although the PCRA court dismissed Appellant's PCRA petition as untimely and because it was without merit, "we may affirm the decision of the [PCRA] court if there is any basis on the record to support the [PCRA] court's action[.]" ***Commonwealth v. Wiley***, 966 A.2d 1153, 1157 (Pa. Super. 2009) (citation omitted).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/3/19