

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
:
v. :
:
:
BERNARD JERRY :
:
Appellant : No. 361 WDA 2021

Appeal from the PCRA Order Entered March 1, 2021
In the Court of Common Pleas of Beaver County Criminal Division at
No(s): CP-04-0000197-1977,
CP-04-CR-0000196-1977, CP-04-CR-0000317-1977

BEFORE: LAZARUS, J., SULLIVAN, J., and PELLEGRINI, J.*

MEMORANDUM BY LAZARUS, J.:

FILED: April 6, 2022

Bernard Jerry appeals *pro se* from the order, entered in the court of Common Pleas of Beaver County, dismissing, without a hearing,¹ his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After review, we affirm.²

A prior panel of this Court summarized the factual and procedural history of this case as follows:

* Retired Senior Judge assigned to the Superior Court.

¹ Pursuant to Pa.R.Crim.P. 907, a PCRA court has discretion to dismiss a PCRA petition without a hearing if the court is satisfied that there are no genuine issues concerning any material fact, that the defendant is not entitled to post-conviction collateral relief, and that no legitimate purpose would be served by further proceedings. Pa.R.Crim.P. 907(1); ***Commonwealth v. Roney***, 79 A.3d 595, 604 (2013).

² The Commonwealth has not filed a brief.

[Jerry] and a co-defendant robbed a grocery store on February 13, 1977, during which the store clerk was shot and killed. Following a jury trial, [Jerry] was convicted on August 16, 1977 of first-degree murder, robbery, reckless endangerment of another person, aggravated assault, simple assault, and criminal conspiracy to commit felony murder. On April 12, 1978, [Jerry] was sentenced to life imprisonment on the first-degree murder conviction and to consecutive terms of imprisonment of 10 to 20 years on the robbery charge and 5 to 10 years on the criminal conspiracy charge. The sentences were suspended on the remaining convictions. [Jerry] filed an appeal to the Pennsylvania Supreme Court on April 13, 1978; the Court remanded for appointment of counsel and an evidentiary hearing on [Jerry's] claims of trial counsel's ineffectiveness. ***Commonwealth v. Jerry***, 401 A.2d 310 (Pa.1979). On remand, the trial court ruled that counsel was not ineffective. Our Supreme Court affirmed the judgment of sentence on March 10, 1982, and the United States Supreme Court denied [Jerry's] petition for writ of *certiorari* on October 4, 1982. [***Pennsylvania***] ***v. Jerry***, 441 A.2d 1210 (Pa. 1982), *cert. denied*, 459 U.S. 845 (1982).

Commonwealth v. Jerry, 1257 WDA 2012, slip op. at 1–2 (Pa. Super. filed March 8, 2013). Subsequently, Jerry filed a series of unsuccessful petitions for post-conviction relief. ***Id.***

Jerry's seventeenth petition, filed on December 26, 2018, was denied on February 26, 2019, and his appeal from that order was affirmed by this Court in a memorandum decision filed on January 7, 2020. ***See Commonwealth v. Jerry***, 389 WDA 2019 (Pa. Super. filed Jan. 7, 2020) (unpublished memorandum decision). Jerry did not seek allowance of appeal in the Pennsylvania Supreme Court.

On January 20, 2021, Jerry filed his eighteenth PCRA petition, claiming the January 7, 2020 memorandum decision was a newly-discovered fact and, as a result of governmental interference on the part of either the Deputy

Prothonotary or prison officials, he did not receive it until August 3, 2020. **See** PCRA Petition, 1/20/21, at 3. Specifically, Jerry alleged he did not receive a copy of this Court's January 7, 2020 decision in time to file for en banc reargument in this Court or allowance of appeal in the Pennsylvania Supreme Court. **Id.** at 2. The PCRA court dismissed Jerry's petition. This timely appeal followed. Jerry raises the following issues:

1. Whether it was governmental interference when the Deputy Prothonotary did not timely send [Jerry] the January 7, 2020 Opinion from the Superior Court, and it was a newly discovered fact?
2. Whether [p]rison [o]fficials confiscated the January 7, 2020 Superior Court Opining, and it was a newly discovered fact?

Appellant's Brief, at ii. Jerry is not entitled to relief.

When the PCRA court denies relief, we review to "determine whether the PCRA court's order is supported by the record and free of legal error." **Commonwealth v. Smith**, 181 A.3d 1168, 1174 (Pa. Super. 2018).

Jerry's judgment of sentence became final in 1982, when the United States Supreme Court denied his petition for *writ of certiorari*. **Commonwealth v. Jerry**, 459 U.S. 845 (1982). Consequently, his present petition, filed in 2021, is patently untimely. In order for the PCRA court to have jurisdiction to review the merits of his claim, Jerry must prove that he meets one of the exceptions to the timeliness requirements set forth in 42 Pa.C.S.A § 9545(b). A petition invoking one of these exceptions must have been filed within one year from the date the claim could have been presented.

42 Pa.C.S.A. § 9545(b)(2). Jerry asserts his claim satisfies the newly-discovered fact exception under section 9545(b)(1)(ii).

“To qualify for an exception to the PCRA’s time limitations under subsection 9545(b)(1)(ii), a petitioner need only establish that the acts upon which the claim is based were unknown to him *and could not have been ascertained by the exercise of due diligence.*” **Commonwealth v. Burton**, 158 A.3d 618, 629 (Pa. 2017) (emphasis added).

The decision was filed on January 7, 2020, and thus Jerry had one year, until January 7, 2021 to file his petition. Jerry filed his petition on January 20, 2021, beyond the one-year limit. He alleges, however, that he did not receive a copy of the decision until August 3, 2020.³ Appellant’s Brief, at 1. Even accepting this timeline, and accepting that the decision is a newly-discovered fact,⁴ Jerry has not established that he acted with due diligence.

³ **See Commonwealth v. Burton, supra** at 620 (due to unrepresented inmates’ diminished access to such records, public record presumption “does not apply to *pro se* prisoner petitioners.”). We note also that Jerry alleged in his petition that in light of the COVID-19 pandemic, he did not have access to the prison library. **See** Appellant’s Brief, at 2. **See also Commonwealth v. Small**, 238 A.3d 1267, 1268 (Pa. 2020) (our Supreme Court recently “disavow[ed] the public record presumption [and overruled any] earlier decisions, including [its] own, [that] relied upon and applied that presumption to reject a petitioner’s claim.”). Thus, the presumption no longer exists for any PCRA petitioner, whether incarcerated or not.

⁴ We recognize that judicial decision are not “facts” that would invoke section 9545(b)(1)(ii). **See Commonwealth v. Watts**, 23 A.3d 980, 986 (Pa. 2011); **Commonwealth v. Hackett**, 956 A.2d 978 (Pa. 2008). However, Jerry’s focus here is not on the “decisional law,” but on the fact that he was precluded from timely filing for en banc review or allowance of appeal in the Pennsylvania Supreme Court.

Burton, supra. Jerry fails to explain why he waited over one year, until July of 2020, to inquire about the disposition of his March 2019 appeal from the PCRA court's February 26, 2019 dismissal of his seventeenth petition. In that petition he had alleged that based on a newly-discovered fact, a federal court decision, his 1979 waiver of counsel colloquy was defective. This Court's decision, which affirmed the PCRA court's dismissal, found the issue undeveloped and therefore waived, stating: "[Jerry] does not clearly articulate what new information the federal district court opinion contains and its significance[.]" **Commonwealth v. Jerry**, 389 WDA 2019, at *6. We also noted that Jerry did not establish that the factual basis for his claim, an inadequate colloquy, was a newly-discovered fact since it occurred forty years ago, and in his presence. **Id.** at *7. "Further, [Jerry] does not establish—let alone address—why the purported inadequacy of his waiver of counsel colloquy in 1979 could not have been ascertained earlier by the exercise of due diligence." **Id.**

Here, we are presented with a similar obstacle. Jerry does not establish why the disposition of his appeal could not have been ascertained earlier with the exercise of due diligence. **Burton, supra.** Even given the limited access to information in the public domain as a result of both incarceration and the pandemic-related closure of the prison library, neither explains why he waited until July of 2020 to inquire about the disposition of an appeal he took in March of 2019.

Furthermore, with respect to governmental interference, as this Court stated twenty years ago in another of Jerry's appeals from dismissal of a PCRA petition:

Assuming, *arguendo*, that 42 Pa.C.S.A. § 9545(b)(1)(i) applies and that [Jerry] was prevented from seeking timely review by the [S]upreme [C]ourt by governmental interference, he must "plead and prove by a preponderance of the evidence" that he is eligible for relief under 42 Pa.C.S.A. § 9543. "Th[is] section provides that a PCRA petitioner must plead that his conviction resulted from "[t]he improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court." ***Commonwealth v. Hanes***, 579 A.2d 920, 925 (Pa. Super. 1990) (quoting 42 Pa.C.S.[A] § 9543(a)(2)(iv)). . . . No meritorious appealable issue exists. . . . [L]acking a meritorious appealable issue, [Jerry] is no eligible for PCRA relief.

Commonwealth v. Jerry, 773 & 774 WDA 2002 (Pa. Super. filed Dec. 3, 2002) (unpublished memorandum decision).

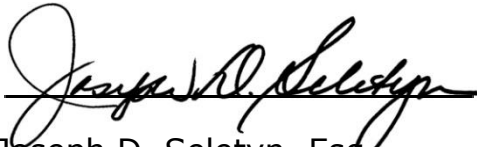
The PCRA court determined that Jerry's petition was "devoid of any description of the merit of any issue from his seventeenth petition. Rather, . . . the issues raised in [Jerry's] seventeenth petition were waived and meritless." Rule 1925(a) Opinion, 3/25/21, at 10. We agree. Jerry, therefore, is not eligible for relief under section 9543(a) of the PCRA. **See** 42 Pa.C.S.A. § 9543(a)(2)(iv) ("To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence[]: (2) That the conviction or sentence resulted from one or more of the following . . . (iv) The improper obstruction by government officials of the petitioner's right of

appeal where a meritorious appealable issue existed and was properly preserved in the trial court.”) (emphasis added).

We affirm the PCRA court’s order.

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: 4/6/2022