

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT CARTER	:	
	:	
Appellant	:	No. 901 EDA 2021

Appeal from the PCRA Order Entered March 12, 2021
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007203-2011

BEFORE: DUBOW, J., McLAUGHLIN, J., and KING, J.

MEMORANDUM BY KING, J.:

FILED JUNE 22, 2022

Appellant, Robert Carter, appeals *pro se* from the order entered in the Philadelphia County Court of Common Pleas, which dismissed as untimely his second petition under the Post-Conviction Relief Act (“PCRA”).¹ We affirm.

In its opinion, the PCRA court fully and correctly sets forth the relevant facts and most of the procedural history of this case. (**See** PCRA Court Opinion, filed June 28, 2021, at 1-4). Therefore, we have no reason to restate them.

Appellant raises one issue for our review:

Whether the PCRA court erred when it failed to consider Appellant’s subsequent post-conviction petition under the miscarriage of justice standard which has yet to be refined or overruled but provides that relief is warranted where the proceedings resulted in a conviction that was so unfair that

¹ 42 Pa.C.S.A. §§ 9541-9546.

a miscarriage of justice occurred which no civilized society can tolerate?

(Appellant's Brief at 4) (unnecessary capitalization omitted).

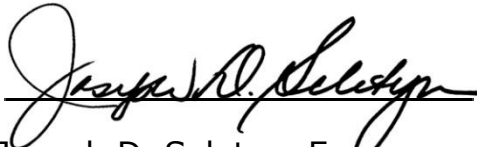
Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101, 108 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We give no similar deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa.Super. 2012).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Glenn B. Bronson, we conclude Appellant's issue merits no relief. In its opinion, the PCRA court comprehensively discusses and properly disposes of the question presented. (**See** PCRA Court Opinion at 4-9) (finding Appellant's petition is facially untimely and no exception to PCRA time-bar applies where: (1) any issue concerning search warrant does not constitute newly-discovered fact because search warrant was in exhibit packet, so Appellant knew about any defect regarding search warrant no later than start of 2013 trial; (2) silver box removed from Acura during search does not constitute newly-discovered

fact because accident investigation division report discussing silver box was in trial exhibits, so Appellant knew or should have known about it prior to start of 2013 trial; (3) Appellant's general assertion of withholding of evidence is vague; to extent that Appellant purports to raise governmental interference exception based on prosecutorial misconduct, such claim fails for lack of specificity; (4) further, governmental interference claims fail because Appellant does not establish how any governmental interference prevented him from raising issues concerning validity of search warrant or removal of silver box from Acura earlier than current facially untimely petition). The record supports the PCRA court's rationale. **See Conway, supra.** Accordingly, we affirm on the basis of the PCRA court's opinion.

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: 6/22/2022

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF
PENNSYLVANIA

v.

ROBERT CARTER

:
:
:
:
:

:

OPINION

CP-51-CR-0007203-2011

FILED

JUN 28 2021

Office of Judicial Records
Appeals/Post Trial

BRONSON, J.

June 28, 2021

On February 13, 2013, following a jury trial before this Court, defendant Robert Carter was convicted of one count of murder of the third degree (18 Pa.C.S. § 2502(c)), one count of homicide by vehicle (75 Pa.C.S. § 3732(a)), one count of causing an accident involving death while not properly licensed (75 Pa.C.S. § 3742.1(a)), three counts of aggravated assault by vehicle (75 Pa.C.S. § 3732.1(a)), three counts of first-degree aggravated assault (18 Pa.C.S. § 2702(a)), one count of recklessly endangering another person (18 Pa.C.S. § 2705), and one count of receiving stolen property (18 Pa.C.S. § 3925(a)). Defendant was acquitted of one charge of fleeing or attempting to elude a police officer (75 Pa.C.S. § 3733(a)). On April 19, 2013, the Court imposed an aggregate sentence of 25 to 50 years incarceration. Defendant was represented at trial and at sentencing by Regina Coyne, Esquire.

On July 15, 2014, the Superior Court affirmed defendant’s judgment of sentence. Defendant then filed a *pro se* petition under the Post-Conviction Relief Act (“PCRA”) on August 4, 2014. Stephen Seidel, Esquire was appointed to represent defendant and filed a letter stating there was no merit to defendant’s claims for collateral relief, pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). However, after finding Mr. Seidel’s letter to be

inadequate, this Court relieved Mr. Seidel and appointed Gary Server, Esquire to represent defendant. Mr. Server then filed a letter, pursuant to *Finley*, stating that there was no merit to defendant's claims for collateral relief. *See Finley* Letter of Gary Server, Esquire, filed 2/8/16. The Court dismissed defendant's PCRA petition and the Superior Court affirmed the Court's order dismissing defendant's petition on May 16, 2017.

Defendant then filed another *pro se* PCRA petition, which is here at issue, on May 20, 2020 ("Second Petition"). On July 7, 2020, defendant filed an amended petition, but raised no new claims ("Amended Second Petition"). The Commonwealth filed a Motion to Dismiss on January 4, 2021. On January 29, 2021, the Court issued notice pursuant to Pa.R.Crim.P. 907 of its intent to dismiss defendant's petition without an evidentiary hearing. On February 18, 2021, defendant filed an Objection/Response to Notice of Dismissal ("907 Response"). On March 12, 2021, the Court formally dismissed defendant's second PCRA petition.

Defendant has now appealed the Court's dismissal of his Second Petition, alleging that: "A. Philadelphia Police Officer tampered with physical evidence by illegally and unlawfully searching the silver Acura, without an [*sic*] valid search warrant; B. Philadelphia Police Officer illegally removed and took physical evidence from under the hood of the silver Acura; C. Prosecutorial Misconduct by the withholding of physical evidence from my case; D. Governmental Interference by prosecutor's failure to disclose withheld evidence, enabling me [*sic*] from developing my claim." Concise Statement of Error Complained of on Appeal Filed Pursuant to Pa. R. App. Pro. 1925(b) ¶¶ A-D ("Statement of Errors"). For the reasons set forth below, defendant's claims are time-barred and/or waived, and the PCRA Court's order dismissing his second PCRA petition should be affirmed.

I. FACTUAL BACKGROUND

The factual basis underlying defendant's convictions was set forth in this Court's section

1925(a) opinion filed in defendant's direct appeal, as follows:

At trial, the Commonwealth presented the testimony of Matthew Gavula, David Gordon, Jr., Henrietta Davis, Dr. Aaron Rosen, Philadelphia Police Officers Joseph Rapone, John Krewer, John Godlewski, Jose Roman, and Jason Sommerville, Philadelphia Police Sergeant Michael Davis, and, by stipulation, the testimony of Yen Luu. Viewed in the light most favorable to the Commonwealth as the verdict winner, their testimony established the following:

On April 5, 2011, at approximately 7 p.m., Philadelphia Police Officers Joseph Rapone and Bill Postowski were patrolling the area of Southwest Philadelphia. N.T. 2/12/2013 at 7-8. They were parked at the corner of 55th Street and Kingsessing Avenue when they observed a silver Acura driving down the street. N.T. 2/12/2013 at 12. As Acuras are commonly stolen vehicles in Philadelphia, Officer Rapone ran the license plate of the Acura through the patrol vehicle's computer. N.T. 2/12/2013 at 13. The computer report indicated that the Acura had been stolen in Upper Darby. N.T. 2/12/2013 at 14. Officer Rapone immediately activated the lights and sirens on his patrol car and began following the car, which was driven by defendant. N.T. 2/12/2013 at 14. Instead of pulling over, defendant ran a stop sign and accelerated. N.T. 2/12/2013 at 14-18. Officers Rapone and Postowski continued pursuing defendant for a number of blocks, during which defendant continued to accelerate, ultimately reaching speeds of 75 to 80 miles per hour, and disobeyed traffic signals. N.T. 2/12/2013 at 18-24, 137. Officer Rapone called for backup. N.T. 2/12/2013 at 15. During the chase, Officer Rapone observed that the car had two occupants: defendant, who was driving, and another person, later identified as Kalil Sephes, who was sitting in the front passenger seat. N.T. 2/12/2013 at 16.

When defendant reached the corner of 58th Street and Chester Avenue, he ran a red light, smashing into the right passenger side of a Hyundai Sonata driven by David Gordon, Jr. N.T. 2/12/2013 at 27-28, 73-78. Officers Rapone and Postowski, who had been approximately one block away when the crash occurred, arrived at the scene moments later. N.T. 2/12/2013 at 27-30. The silver Acura that defendant had been driving was pinned against a wall on the northwest corner of 58th Street and Chester Avenue. N.T. 2/12/2013 at 28. Mr. Sephes had been ejected from the vehicle and was lying next to the passenger side of the Acura. N.T. 2/12/2013 at 29. It was immediately apparent that he was deceased. N.T. 2/11/2013 at 247; 2/12/2013 at 29. Defendant was trapped in the driver's seat of the vehicle. N.T. 2/12/2013 at 29-30.

As Officer Rapone was attempting to extract defendant from the vehicle, he heard a voice say “help,” and discovered that an elderly woman, later identified as Henrietta Davis, was trapped underneath the Acura. N.T. 2/12/2013 at 29-30. Ms. Davis had been waiting for a trolley at the corner of 58th Street and Chester Avenue along with her friends, Lena Campbell and Leslie Downer. N.T. 2/12/2013 at 91-95. When defendant’s Acura crashed into the wall on the corner, Ms. Davis and Ms. Campbell had been hit by the car and trapped. N.T. 2/12/2013 at 30, 96-98. Police were able to extricate them from the wreckage of the Acura, which was mangled and burning. N.T. 2/12/2013 at 22-23, 97-98, 148. Mr. Downer had been hit by the Acura and was lying on the ground near the car. N.T. 2/12/2013 at 151. Defendant was cut from the driver’s seat of the Acura using the jaws of life. N.T. 2/12/2013 at 24.

All of the victims were taken to area hospitals except for Kalil Sephes, who was pronounced dead at the scene by paramedics. N.T. 2/11/2013 at 247; 2/13/2013 at 56. His cause of death was a torn brain stem. N.T. 2/12/2013 at 60-61. Ms. Davis, who was 79 years old, had suffered a broken leg, a concussion, a broken nose, and fractured ribs. N.T. 2/12/2013 at 222. Lena Campbell, who was 82 years old, suffered a concussion and fluid in her abdomen. N.T. 2/12/2013 at 222-223. Leslie Downer, who was 85 years old, suffered a cranial hemorrhage, a broken jaw, a fractured rib, and soft tissue swelling. N.T. 2/12/2013 at 223-224. Mr. Gordon, who was 29 years old, suffered a broken leg. N.T. 2/12/2013 at 224.

Trial Court Opinion, filed October 30, 2013 at pp. 2-4.

II. DISCUSSION

An appellate court’s review of a PCRA court’s grant or denial of relief “is limited to determining whether the court’s findings are supported by the record and the court’s order is otherwise free of legal error.” *Commonwealth v. Green*, 14 A.3d 114, 116 (Pa. Super. 2011) (internal quotations omitted). The reviewing court “will not disturb findings that are supported by the record.” *Id.*

Under the PCRA, all petitions, “including a second or subsequent petition,” must be filed within one year of the date that judgment on the case became final. 42 Pa.C.S. § 9545(b); *see Commonwealth v. Bennett*, 930 A.2d 1264, 1267 (Pa. 2007). This time limit is jurisdictional, and a court may only review an untimely petition if one of the three statutory exceptions to the

timeliness requirement applies. 42 Pa.C.S. § 9545(b)(1); *Commonwealth v. Murray*, 753 A.2d 201, 203 (Pa. 2000). Furthermore, the statutory exceptions are themselves subject to a timeliness requirement, and must be invoked “within one year of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2); *Commonwealth v. Howard*, 249 A.3d 1229, 1233 (Pa. Super. 2021).

Defendant’s judgment of sentence became final on August 14, 2014, 30 days after the Superior Court affirmed defendant’s judgment of sentence. Therefore, defendant had until August 14, 2015, to timely file a PCRA petition. As defendant did not file the instant petition until May 20, 2020, his petition is facially untimely. Therefore, in order for this Court to have jurisdiction to review the merits of defendant’s claims, defendant must plead and prove that one of the three statutory exceptions to the timeliness requirement applies to his case, and he must have filed his petition within one year of when the claim could have been presented. 42 Pa.C.S. § 9545(b)(1) & (b)(2). Those three exceptions are: 1) where “the failure to raise the claim previously was the result of interference of government officials...;” 2) where “the facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by the exercise of due diligence;” and 3) where “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 [the PCRA] and has been held by that court to apply retroactively.” 42 Pa.C.S. § 9545(b)(1). The burden is on the defendant to allege and prove that one of the timeliness exceptions applies. *See Commonwealth v. Marshall*, 947 A.2d 714, 719 (Pa. 2008). If the petition is not timely filed, and none of the three exceptions applies, the Court is without jurisdiction to address the merits of the petition. *See Bennett*, 930 A.2d at 1267.

Here, defendant invokes the newly-discovered facts and governmental interference exceptions to the time limitations of the PCRA. Amended Second Petition at ¶ 5. To qualify for

the newly-discovered facts exception to the time limitations of the PCRA, a petitioner must 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.” *Commonwealth v. Burton*, 158 A.3d 618, 629 (Pa. 2017). Due diligence demands that a petitioner take reasonable steps to protect his own interests. *Commonwealth v. Carr*, 768 A.2d 1164, 1168 (Pa. Super. 2001). A petitioner must explain why he could not have obtained the new facts earlier through the use of due diligence. *Commonwealth v. Breakiron*, 781 A.2d 94, 98 (Pa. 2001). This rule is strictly enforced. *Commonwealth v. Vega*, 754 A.2d 714, 718 (Pa. Super. 2000).

To properly rely on the governmental interference exception, defendant must demonstrate that the “failure to previously raise the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise of due diligence.” *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1267 (Pa. 2008) (citing *Breakiron*, 781 A.2d at 98); *see also* 42 Pa.C.S. § 9545(b)(1)(i). This requires the petitioner to show that due to the interference of a government actor, he could not have filed his claim earlier. *Commonwealth v. Vinson*, 249 A.3d 1197, 1205 (Pa. Super. 2021).

A. The Search of the Acura

Defendant first claims that “Philadelphia Police Officer tampered with physical evidence by illegally and unlawfully searching the silver Acura, without an [*sic*] valid search warrant.” Statement of Errors at ¶ A. This claim is time-barred.

In his petition, defendant specifically averred that a police officer unlawfully searched defendant’s Acura under the authority of a search warrant that had not been signed by a judge or magistrate and was therefore invalid. Amended Second Petition at ¶¶ 5(i), 5(ii), & 6. The Commonwealth did not introduce a search warrant for the Acura during defendant’s trial. However, a copy of the warrant was marked for identification as a Commonwealth exhibit and

included in the exhibit packet that the Commonwealth turned over to defense counsel and the Court prior to trial. *See* Commonwealth Exh. C-4 (marked for identification).

It is true that the copy of the search warrant turned over in the exhibit packet was not signed by an issuing authority. *Id.* However, the presence of the unsigned warrant in the exhibit packet at trial demonstrates that defendant knew, or should have known, about any issue with the warrant no later than the start of the trial in 2013. Moreover, defendant makes no averments as to how any governmental interference prevented him from making a claim about the warrant earlier than the instant facially untimely petition. Therefore, the claim that police lacked a valid search warrant is time-barred and the Court is without jurisdiction to address the merits of the claim. *See* 42 Pa.C.S. § 9545(b)(1); *Marshall*, 947 A.2d at 719; *Bennett*, 930 A.2d at 1267.

B. Removal of Evidence

Defendant next claims that “Philadelphia Police Officer illegally and unlawfully removed and took physical evidence from under the hood of the silver Acura.” Statement of Errors at ¶ B. Specifically, defendant alleges that police removed a silver box from under the hood of the vehicle, that this box was never turned over to the District Attorney’s office and was withheld from the defense at trial. Statement of Errors at ¶ B; Amended Second Petition at ¶ 5, 6. This claim is time-barred.

Prior to trial, the Commonwealth included a copy of the Accident Investigation Division’s Report (“AID Report”) in its trial exhibits. Commonwealth Exhibit C-2. The AID Report, which was provided to both defense counsel and the Court prior to the start of the trial, included the following: “Search warrant executed on unit #1 [defendant’s Acura] and recovered from behind the dashboard by the transmission hump was one silver box (TRW Model # 77960-SEP – A020 – M1).” Commonwealth Exhibit C-2 at p. 3 (unpaginated). Accordingly, the trial record establishes that the facts upon which the instant claim is predicated, that is, the existence

and removal of the silver box, were known to the defendant at the time of trial in 2013.

Defendant makes no averments as to how any governmental interference prevented him from making this claim earlier than the instant facially untimely petition. Therefore, this claim is time-barred and the Court is without jurisdiction to address the merits of the claim. *See* 42 Pa.C.S. § 9545(b)(1); *Marshall*, 947 A.2d at 719; *Bennett*, 930 A.2d at 1267.

C. Withholding of Evidence by Prosecutors

Defendant next claims “Prosecutorial Misconduct by the withholding of physical evidence from my case.” Statement of Errors at ¶ C. Defendant claims that “[e]vidence from under the hood of the vehicle was withheld” and “[t]he evidence that was removed wasn’t a[] part of [his] discovery, not even any photographs.” 907 Response at ¶¶ 7,8. This claim is time-barred and waived for lack of specificity.

To the extent that defendant is referring to the alleged withholding of the silver box, as discussed in Section II (B), above, defendant knew of the existence and removal of the box at the time of his 2013 trial and makes no averments as to how any governmental interference prevented him from making this claim earlier than the instant facially untimely petition. Therefore, this claim is time-barred and the Court is without jurisdiction to address the merits of the claim. *See* 42 Pa.C.S. § 9545(b)(1); *Marshall*, 947 A.2d at 719; *Bennett*, 930 A.2d at 1267.

To the extent that defendant is referring to some other evidence, he fails to allege in any of his filings what other evidence he believes the prosecution withheld at trial. Therefore, this claim is waived for lack of specificity. *See Cannon*, 954 A.2d at 1228 (where a defendant makes a vague and generalized objection on appeal that leaves the trial court to guess at his or her claims, those claims are deemed to have been waived).

D. Governmental Interference

Finally, defendant claims “Governmental Interference by prosecutor’s failure to disclose withheld evidence, enabling me [*sic*] from developing my claim.” Statement of Errors at ¶ D. This claim is identical to the claim addressed in Section II(C), above, but now with a specific reference to the governmental interference exception to the time limitations of the PCRA. As stated above, defendant makes no averments as to how any governmental interference prevented him from making this claim earlier than the instant facially untimely petition. Therefore, the governmental interference exception does not apply, this claim is time-barred, and the Court is without jurisdiction to address the merits of the claim. *See* 42 Pa.C.S. § 9545(b)(1); *Marshall*, 947 A.2d at 719; *Bennett*, 930 A.2d at 1267.

IV. CONCLUSION

For the foregoing reasons, the Court’s order dismissing defendant’s PCRA Petition should be affirmed.

BY THE COURT:



GLENN B. BRONSON, J.

Commonwealth v. Robert Carter
Type of Order: Opinion

CP-51-CR-0007203-2011

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Court Order upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P.114:

Defense Counsel/Party:

Robert Carter KZ5248
SCI Benner Township
301 Institution Drive
Bellefonte, PA 16823

Type of Service: Personal First Class Mail Other, please specify:

District Attorney:

Lawrence Goode, Esquire
Interim Supervisor, Appeals Unit
Office of the District Attorney
Three South Penn Square
Philadelphia, PA 19107-3499


Type of Service Personal First Class Mail Other, please specify: *Interoffice*

Additional Counsel/Party:

Joseph D. Seletyn, Esquire
Office of the Prothonotary - Superior Court
530 Walnut Street - Suite 315
Philadelphia, PA 19106

Type of Service Personal First Class Mail Other, please specify: *Interoffice*

Dated: June 28, 2021



Katherine Orr, Esq.
Law Clerk to Hon. Glenn B. Bronson