

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WENDELL GRAVES,	:	
	:	
Appellant	:	No. 2081 EDA 2012

Appeal from the PCRA Order Entered October 31, 2011,  
In the Court of Common Pleas of Philadelphia County,  
Criminal Division, at No. CP-51-CR-0510551-2000.

BEFORE: FORD ELLIOTT, P.J.E., BENDER and SHOGAN, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: February 19, 2013

Appellant, Wendell Graves, appeals *pro se* from the order denying his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On May 23, 2001, following a jury trial, Appellant was convicted of first-degree murder, attempted murder, and possessing an instrument of crime. Appellant was sentenced on July 12, 2001. On August 10, 2001, Appellant filed a notice of appeal that was dismissed. Appellant's direct appeal rights were reinstated *nunc pro tunc* on July 10, 2002, and Appellant filed another notice of appeal. This Court affirmed the judgment of sentence on August 19, 2003, and our Supreme Court denied Appellant's petition for allowance of appeal on December 30, 2003. ***Commonwealth v. Graves***,

2358 EDA 2002, unpublished memorandum, 833 A.2d 1145 (Pa. Super. filed August 19, 2003), *appeal denied*, 576 Pa. 720, 841 A.2d 529 (2003).

Appellant filed a *pro se* PCRA petition on December 17, 2004. Counsel was appointed and an amended petition was filed. The petition was denied on October 7, 2005. The denial of the PCRA petition was affirmed by this Court on June 30, 2006, and our Supreme Court denied Appellant's petition for allowance of appeal on November 27, 2006. ***Commonwealth v. Graves***, 3044 EDA 2005, unpublished memorandum, 905 A.2d 1043 (Pa. Super. filed June 30, 2006), *appeal denied*, 590 Pa. 666, 912 A.2d 837 (2006).

Appellant filed a second PCRA petition on January 24, 2007; that petition was dismissed as untimely on November 13, 2007. No appeal was filed.

Appellant filed this, his third, PCRA petition on December 16, 2010. The PCRA court denied this petition as untimely on October 31, 2011. PCRA Court Opinion, 10/31/11. Appellant did not appeal. On January 17, 2012, however, Appellant filed another petition seeking *nunc pro tunc* reinstatement of his appellate rights from the denial of his third petition alleging that he did not receive the PCRA court's order dismissing his petition until December 16, 2011, after the time for filing a notice of appeal had

expired. The PCRA court therefore granted the petition on June 26, 2012.

This *nunc pro tunc* appeal follows.

Appellant presents the following issues for our review:

(1.) DID PCRA COURT ERR IN DENING PETITIONER'S PCRA WITHOUT CONSIDERATION OF PETITIONER'S EMPEDMENT TO FILE TIMELY PCRA DUE TO GOVERNMENT INTERFERANCE ?

(2.) DID TRIAL COURT ERR IN NOT INVESTIGATING EVASIVENESS OF JUROR #7 ON SAME DAY OF POLLING AND NOT THE NEXT MORNING?

(3.) DID TRIAL COUNSEL PROVE TO BE INCOMPETENT AND INEFFECTIVE IN HIS COURSE CHOSEN TO WAIT UNTIL NEXT MORNING AFTER JURY WAS POLLED AND HAD DISPERSED TO EDUCE WHAT HE KNEW AND OBSERVED OF JUROR #7 ON DAY DURING POLLING PROCESS?

(4.) DID TRIAL COUNSEL PROVE INEFFECTIVE IN HIS OMISSION NOT TO OBJECT TO THE ADMISSABILITY OF COURT CRIER'S OFF THE RECORD/OUT OF COURTROOM CONVERSATION WITH JUROR #7 TO SUM UP 'NEXT MORNING COLLOQUY WITH JUROR #7?

(5.) DID DIRECT APPEAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PROPERLY PREPARE, COMMUNICATE WITH HIS CLIENT AND FILE MERITORIOUS ISSUES ON APPEAL ,YET, ONLY TO FILE (1) ONE ISSUE WHICH CHALLENGED THE SUFFICIENCY OF THE EVIDENCE?

(6.) DID APPELLATE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY ABANDONING HIS CLIENT AT CRUCIAL STAGE OF APPELLATE PROCEDURE THEN, GIVING HIS CLIENT PRECISE LATE FILING DATE FOR HABEAS CORPUS PETITION?

(7.) WAS DISTRICT COURT IN ERROR OF JUDICIAL MISCONDUCT WHERE; COURT ADDRESS: THAT PROOF OF COURT-APPOINTED COUNSEL'S ERROR'S AND MISCONDUCT ARE NOT SUFFICIENT TO SUPPORT EQUITABLE TOLLING OF PETITIONER'S 11-16-2007 HABEAS CORPUS PETITION?

Appellant's Brief at 3 (verbatim).

When reviewing the propriety of an order granting or denying PCRA relief, this Court is limited to determining whether the evidence of record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa. Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. ***Commonwealth v. Wilson***, 824 A.2d 331, 333 (Pa. Super. 2003), *appeal denied*, 576 Pa. 712, 839 A.2d 352 (2003).

Before reaching the merits of Appellant's arguments, we must first determine whether Appellant's petition is timely, as the timeliness of a PCRA petition is a jurisdictional requisite. ***Commonwealth v. Burton***, 936 A.2d 521, 527 (Pa. Super. 2007), *appeal denied*, 598 Pa. 786, 959 A.2d 927 (2008). Where a petition fails to satisfy the timeliness requirements of the PCRA, the PCRA court and this Court have no jurisdiction to review the petition by fashioning an equitable exception to timeliness. ***Commonwealth v. Robinson***, 575 Pa. 500, 510, 837 A.2d 1157, 1163 (2003).

Any and all PCRA petitions must be filed within one year of the date on which the petitioner's judgment became final, unless one of three statutory exceptions applies. 42 Pa.C.S.A. § 9545(b)(1); ***Commonwealth v.***

**Derrickson**, 923 A.2d 466, 468 (Pa. Super. 2007), *appeal denied*, 594 Pa. 685, 934 A.2d 72 (2007). Additionally, any petition invoking an exception must be filed “within 60 days of the date the claim could have been presented.” 42 Pa.C.S.A. § 9545(b)(2). It is the petitioner who bears the burden to allege and prove that one of the timeliness exceptions applies. **Commonwealth v. Leggett**, 16 A.3d 1144, 1146 (Pa. Super. 2011). If the petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition. **Commonwealth v. Perrin**, 947 A.2d 1284, 1285 (Pa. Super. 2008).

Appellant’s judgment of sentence became final on March 29, 2004, which was ninety days after our Supreme Court denied *allocatur* on direct appeal and the date upon which the time expired for requesting a writ of *certiorari* with the United States Supreme Court. 42 Pa.C.S.A. § 9545(b)(3). Accordingly, Appellant had one year from March 29, 2004, or until March 29, 2005, to file all PCRA petitions unless one of the statutory exceptions in subsection 9545(b)(1)(i)-(iii) applied.

Appellant filed his third and current PCRA petition on December 16, 2010. Therefore, Appellant’s PCRA petition is facially untimely and must be

dismissed unless his petition has alleged, and he can prove, one of the following exceptions:

- (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). These exceptions are the only exceptions to the one-year time limitation for the filing of a PCRA petition.

Appellant argues that his petition is timely as it falls within the “government interference” exception at 42 Pa.C.S.A. § 9545(b)(1)(i). Appellant’s Brief at 5-6. Appellant asserts that he was transferred to the Muskegon Correctional Facility in Michigan, in March of 2010. *Id.* at 5. Appellant maintains that his transfer to Michigan’s Department of Corrections constituted government interference and kept him from timely filing a PCRA petition because the facility to which he was transferred was not equipped for Pennsylvania inmates as it did not allow for access to Pennsylvania law. *Id.* at 6. Muskegon eventually became equipped with

Pennsylvania law, and Appellant maintains that it was at that point he was able to file the current petition. *Id.*

Appellant has failed to establish that government interference precluded him from timely filing the current PCRA petition. Appellant baldly asserts that due to his transfer to a facility in Michigan, he did not have access to Pennsylvania legal materials and, thus, was unable to timely file his current PCRA petition. This assertion alone fails to establish the governmental interference exception to the time bar.

Additionally, Appellant fails to establish that the petition was filed within 60 days of the date the claims could have been presented, as is required in order to establish one of the three exceptions. 42 Pa.C.S.A. § 9545(b)(2). The factual and procedural history of this case, even as outlined by Appellant in his brief, reveals that the underlying claims raised in this petition existed prior to Appellant's transfer in March of 2010.

A review of the record reflects that all but one of the claims raised in the current PCRA petition were raised in Appellant's first PCRA petition, filed in December 2004, and amended in May 2005. Appellant's remaining claim is the allegation that PCRA counsel failed to inform Appellant when the Pennsylvania Supreme Court denied *allocatur*, thereby preventing Appellant from filing a timely federal *habeas* petition. Appellant's Brief at 8-9; Appellant's Reply Brief at 3. Appellant represents counsel failed to advise

Appellant of the March 9, 2007 deadline to file the federal petition. *Id.* The federal district court dismissed Appellant's *habeas* petition as untimely on May 27, 2008. ***Graves v. Rozum***, Civil Action No. 07-4939, not reported in F.Supp. 2d. (E.D.Pa. filed May 27, 2008). Thus, Appellant would have been aware of this claim of ineffective assistance of PCRA counsel at that time. Moreover, even if we used the date of the denial of the writ of *certiorari* by the United States Supreme Court on October 5, 2009, ***Graves v. Rozum***, 130 S.Ct. 297 (U.S. filed October 5, 2009), as Appellant argues, Appellant's failure to timely raise this claim was not a result of the alleged government interference. The alleged interference resulting from Appellant's transfer to Muskegon did not occur until March of 2010. Appellant's Brief at 5. Thus, Appellant has failed to meet the time requirement for the government interference exception and no other exceptions are applicable.

We, therefore, conclude that the evidence of record supports the PCRA court's determination that Appellant's third PCRA petition was untimely filed. Accordingly, we find no error in the dismissal of Appellant's petition and decline review of the merits of the claims raised in his PCRA petition. ***See Commonwealth v. Copenhefer***, 596 Pa. 104, 108, 941 A.2d 646, 648-649 (2007) ("The PCRA's timeliness requirements are jurisdictional in nature, and a court may not address the merits of the issue raised if the PCRA petition was not timely filed.").



J-S76045-12

Order affirmed.