

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MARLON HURDLE

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 21 MDA 2012

Appeal from the Order Dated December 6, 2011  
In the Court of Common Pleas of Lancaster County  
Criminal Division at No(s): CP-36-CR-0003270-1994

BEFORE: SHOGAN, J., MUNDY, J., and OTT, J.

MEMORANDUM BY MUNDY, J.:

Filed: February 5, 2013

Appellant, Marlon Hurdle, appeals *pro se* from the December 6, 2011 order dismissing his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The relevant facts and procedural history, as gleaned from the certified record, are as follows. On December 8, 1993, Appellant was charged with two counts of criminal homicide.<sup>1</sup> On May 16, 1995, following a jury trial, Appellant was convicted of both counts. Thereafter, on May 19, 1995, the trial court sentenced Appellant to serve two consecutive terms of life imprisonment. Appellant filed a timely notice of appeal on June 13, 1995. On July 10, 1996, this Court affirmed the judgment of sentence, and on June

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<sup>1</sup> 18 Pa.C.S.A. § 2501(a).

11, 1997, our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Hurdle***, 695 A.2d 209 (Pa. Super. 1996) (unpublished memorandum), *appeal denied*, 694 A.2d 620 (Pa. 1997).

Subsequently, on August 19, 2011, Appellant filed the instant PCRA petition, his first. The PCRA court appointed counsel, Christopher P. Lyden, Esquire (Attorney Lyden), to represent Appellant. On September 14, 2011, Attorney Lyden filed a no-merit letter and motion to withdraw in accordance with ***Turner/Finley***.<sup>2</sup> Thereafter, on October 5, 2011, the PCRA court notified Appellant of its intent to grant counsel's motion to withdraw and dismiss Appellant's PCRA petition without hearing pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure. **See** Pa.R.Crim.P. 907. On October 24, 2011, Appellant filed a formal objection to the Rule 907 notice. On December 6, 2011, the PCRA court granted counsel's motion to withdraw and dismissed Appellant's PCRA petition as untimely. This timely appeal followed on December 27, 2011.<sup>3</sup>

On appeal, Appellant raises the following issues for our review.

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<sup>2</sup> ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

<sup>3</sup> The PCRA court neither directed Appellant to file a Rule 1925(b) statement nor filed a Rule 1925(a) opinion. **See** Pa.R.A.P. 1925. However, "our review of the record ... and the trial transcript[s], [has] adequately apprised us of the trial court's reasoning in relation to the [] issues raised herein. Therefore, we decline to ... remand[] for the preparation of a 1925(a) opinion ...." ***Commonwealth v. Hood***, 872 A.2d 175, 178 (Pa. Super. 2005).

- 1) Whether the [PCRA] court error [sic] in accepting counsel[’s] no-merit letter where counsel failed to advance claims of trial counsel[’]s [i]neffectiveness, nor explore extra record matter for [p]ost-[c]onviction review[?]
- 2) Whether the trial court committed [g]overnment [i]nterference in failing to provide [A]ppellant with specific [i]nstruction[s] regarding how to obtain a copy of [the] trial record[?]
- 3) Whether [] [A]ppellant has been denied his constitutional right to due process of the law by being forced to proceed on appellate review without being provided with a full transcripts [sic], or other equivalent picture of the trial proceeding[s?]

Appellant’s Brief at 4.

In his first issue, Appellant avers that the PCRA court erred in accepting counsel’s no-merit letter. Specifically, Appellant argues that Attorney Lyden “did not adequately assess and discuss the claims presented in Appellant’s PCRA petition,” and that the no-merit letter “fails to acknowledge that the claim[s] [Attorney Lyden] discussed [are] not the claims petitioner presented for review.” *Id.* at 9. Appellant also contends that Attorney Lyden was required to conduct an extra-record review of said claims, namely by interviewing previous counsel and witnesses. *Id.*

Generally speaking, an indigent petitioner is entitled to the appointment of counsel on his first post-conviction attack of his conviction. ***Commonwealth v. Smith***, 572 Pa. 572, 818 A.2d 494[, 499] (2003). This right to counsel, although not constitutionally mandated, derives from the Pennsylvania Rules of Criminal Procedure, see Pa.R.Crim.P. 904(B); *in*

*accord, Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 699 (Pa. 1998), and is unaffected by the fact that a petition is untimely upon its face. *Smith*[, *supra*].

*Commonwealth v. Stout*, 978 A.2d 984, 988 (Pa. Super. 2009).

Accordingly, if the PCRA court erred in allowing counsel to withdraw, a remand is necessary notwithstanding any failure to comply with the PCRA's timeliness requirements. *Id.*

The *Turner/Finley* decisions provide the manner for post-conviction counsel to withdraw from representation. The holdings of those cases mandate an independent review of the record by competent counsel before a PCRA court or appellate court can authorize an attorney's withdrawal. The necessary independent review requires counsel to file a "no-merit" letter detailing the nature and extent of his review and list each issue the petitioner wishes to have examined, explaining why those issues are meritless.

*Commonwealth v. Rykard*, 55 A.3d 1177, 1184 (Pa. Super. 2012)

(citations omitted).

Instantly, we discern no support in the record for Appellant's contention that counsel misconstrued the claims presented in Appellant's PCRA petition. A review of the petition reveals that Appellant challenged the effectiveness of trial counsel on three grounds, to wit, counsel's failure to present evidence in support of self-defense, counsel's failure to present evidence of voluntary intoxication, and counsel's failure to inform Appellant of his right to consular assistance under the Vienna Convention. **See** Appellant's Post-Conviction Collateral Relief Act Petition, 8/19/11, at 3(c).

Appellant also challenged an allegedly erroneous jury instruction regarding felony-murder. *Id.* at 3(h). In his no-merit letter, Attorney Lyden accurately summarized Appellant's claims. **See** PCRA Counsel's Motion to Withdraw Appearance, 9/14/11, at 1.<sup>4</sup>

Insofar as Appellant asserts that counsel was required to conduct an extra-record review of the claims, our Supreme Court has previously stated, "[c]ompelling counsel to undertake a potentially exhaustive investigation where counsel has concluded that there is no merit to the claim—and where there is not even the barest indication that such an investigation will prove fruitful—would not serve the ends of justice." ***Commonwealth v. Porter***, 728 A.2d 890, 895 (Pa. 1999). After reviewing the record, Attorney Lyden concluded that each of Appellant's claims lacked merit and explained the reasoning for his conclusion. **See** PCRA Counsel's Motion to Withdraw Appearance, 9/14/11, at 3-4. Our review of the record confirms counsel's conclusion, and there is no indication that further investigation by counsel would have proven fruitful. Thus, Attorney Lyden was not required to perform an extra-record investigation prior to withdrawing pursuant to ***Turner/Finley***. **See *Porter, supra***. Accordingly, we conclude the PCRA court did not err in determining that this issue is without merit.

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<sup>4</sup> We note that counsel's no-merit letter lacks pagination. For the ease of our discussion, we have assigned each page a corresponding number.

We turn now to Appellant's second and third issues wherein he challenges the dismissal of the instant PCRA petition as untimely. Specifically, Appellant alleges that the trial court engaged in governmental interference and violated his due process rights by denying his repeated requests for transcripts, and thereby prevented him from filing a timely PCRA petition. Appellant's Brief at 20-21.

Our review of a PCRA court's decision 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. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "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. Carter***, 21 A.3d 680, 682 (Pa. Super. 2011) (citation omitted). To be eligible for PCRA relief, a defendant must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). Furthermore, these issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3).

This Court cannot address the merits of an appellant's claims without first considering the timeliness of his PCRA petition because it implicates the jurisdiction of both this Court and the PCRA court. ***Commonwealth v. Williams***, 35 A.3d 44, 52 (Pa. Super. 2011) (citation omitted), *appeal*

*denied*, 50 A.3d 121 (Pa. 2012). “Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.” ***Id.*** “A petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), is met.” ***Commonwealth v. Harris***, 972 A.2d 1196, 1199-1200 (Pa. Super. 2009), *appeal denied*, 982 A.2d 1227. Specifically, a petitioner must allege one of the following three time-bar exceptions.

(i) [T]he 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).

In the instant matter, Appellant did not petition for writ of certiorari in the United States Supreme Court following our Supreme Court’s denial of his petition for allowance of appeal. Consequently, his judgment of sentence

became final on September 9, 1997, when the time for filing a petition for writ of certiorari expired. **See** 42 Pa.C.S.A. § 9545(b)(3). Therefore, in order to be timely, Appellant's PCRA petition had to be filed by September 9, 1998. As noted, Appellant did not file the instant petition until August 19, 2011, thus, it is patently untimely. Therefore, it was necessary for Appellant to plead and prove facts that demonstrate his claim falls within one of the statutory exceptions to the time-bar.

Appellant argues that the PCRA court abused its discretion in dismissing his current PCRA petition as untimely. Specifically, Appellant acknowledges that the petition is untimely on its face but asserts the timeliness exception for governmental interference with the presentation of his claims.<sup>5</sup> Appellant's Brief at 20. Appellant avers "[t]he trial [c]ourt[']s failure to provide [A]ppellant with some form of specific instruction as to how to obtain a copy of the trial record amounts to [g]overnment interference with the presentation of [A]ppellant[']s [p]ost-[c]onviction petition." **Id.** However, it is well settled that a defendant need not possess transcripts and other court documents before pursuing post-conviction relief. **See Commonwealth v. Crider**, 735 A.2d 730, 733 (Pa. Super. 1999) (citation omitted). Moreover, "a court is not required to comply with a

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<sup>5</sup> 42 Pa.C.S.A. § 9545(b)(1)(i).



defendant's request for transcripts in order to pursue relief in a PCRA proceeding where no such action is pending." *Id.*

In the instant case, Appellant filed multiple *pro se* requests for trial transcripts from September 1997, to June 2011 stating that the transcripts were "both necessary and pertinent" in pursuit of Appellant's petition for PCRA relief. *See, e.g.*, Appellant's Motion for Transcripts, 3/7/06. At the time of each request, however, Appellant did not have a PCRA petition pending. Consequently, the trial court disposed of each request by order stating "[Appellant]'s *pro se* [m]otion for [n]otes of [t]estimony ... is denied **as no PCRA petition is pending.**" *See, e.g.*, Order Denying Motion for Transcripts, 3/7/06 (emphasis added).

Based on our careful review of the record, we disagree with Appellant's contention that the trial court committed governmental interference with his ability to pursue PCRA relief by denying his requests for transcripts. *See Crider, supra*. We note that a lack of transcripts did not prevent Appellant from filing the instant PCRA petition. Accordingly, we conclude Appellant has failed to plead and prove an exception to the jurisdictional time-bar found in 42 Pa.C.S.A. § 9545(b)(1).

As the trial court was without jurisdiction to address Appellant's August 19, 2011 PCRA petition, we conclude the trial court properly dismissed said petition. Accordingly, we affirm the December 6, 2011 order dismissing Appellant's PCRA petition.

Order affirmed.

Judge Ott concurs in the result.