

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

STEPHEN JAMES MCANALLY, SR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 246 EDA 2013

Appeal from the PCRA Order December 31, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0008055-2009

BEFORE: PANELLA, OLSON and PLATT,* JJ.

MEMORANDUM BY OLSON, J.:

FILED DECEMBER 04, 2013

Appellant, Stephen James McAnally, Sr., appeals from the order entered on December 31, 2012, dismissing as untimely his first petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541–9546. We affirm.

We summarize the facts and procedural history of this case as follows. On March 2, 2010, Appellant pled guilty to two counts of aggravated indecent assault, five counts of indecent assault, one count of criminal solicitation, two counts of indecent exposure, three counts of corruption of minors, and two counts of open lewdness.¹ The charges stemmed from various sexual incidents between Appellant and three of his granddaughters,

¹ 18 Pa.C.S.A. §§ 3125, 3126, 902, 3127, 6301, and 5901, respectively.

who were all either seven or eight years of age at the time of the events. The trial court held a sentencing hearing on October 14, 2010. At its conclusion, the trial court sentenced Appellant to an aggregate term of 12 to 24 years of incarceration, with a consecutive term of two years of probation. The trial court also determined Appellant was a sexually violent predator. On October 21, 2010, Appellant filed a motion to reconsider his sentence. On February 11, 2011, the trial court denied relief. Appellant did not file a direct appeal.

On April 16, 2012, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel who filed an amended PCRA petition. On October 11, 2012, the PCRA court held an evidentiary hearing wherein trial counsel, Appellant, and Appellant's daughter testified. The parties submitted memoranda in support of their arguments regarding the timeliness of the petition. On December 31, 2012, the PCRA court denied relief, concluding that Appellant's petition was time barred. This timely appeal followed.²

On appeal, Appellant presents a single issue for our review:

Is [Appellant] entitled to have his PCRA petition deemed timely under the "as applied" test as well as a recent decision of the United State[s] Court of Appeals for the Third Circuit for determining whether he was denied due

² On January 9, 2013, Appellant filed a notice of appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on January 25, 2013.

process of law by his counsel's failure to act as promised on [Appellant's] behalf?

Appellant's Brief at 3.

Before we may address the merits of Appellant's claims, we must determine whether we have jurisdiction to hear the appeal pursuant to the PCRA:

[T]he timeliness of a PCRA petition is a jurisdictional requisite. Jurisdictional time limits go to a court's right or competency to adjudicate a controversy. Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. The PCRA now requires a petition, including a second or subsequent petition, to be filed within one year of the date the underlying judgment becomes final. A judgment is deemed 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 review.

Commonwealth v. Williams, 35 A.3d 44, 52 (Pa. Super. 2011) (citations and quotations omitted).

Here, the trial court sentenced Appellant on October 14, 2010. Appellant moved to reconsider his sentence on October 21, 2010 and the trial court denied relief on February 11, 2011. He did not appeal to this Court. Thus, his judgment of sentence became final after the expiration of the 30-day appeal period, or on March 13, 2011. **See** Pa.R.A.P. 903. Because the current PCRA petition was filed *pro se* on April 16, 2012, more than one year after his judgment of sentence became final, it is patently untimely under the PCRA.

“Generally, to obtain merits review of a PCRA petition filed more than one year after a petitioner's sentence became final, the petitioner must allege and prove at least one of the three timeliness exceptions.” **Williams**, 35 A.3d at 52, *citing* 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).³ “[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive

³ **(b) Time for filing petition.—**

(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.

42 Pa.C.S.A. § 9545(b)(1)(i-iii).

merits of a petitioner's PCRA claims.” **Id.** at 53. Moreover, our Supreme Court has repeatedly stated, “a claim of ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits.” **Commonwealth v. Morris**, 822 A.2d 684, 694 (Pa. 2003).

Appellant concedes that his PCRA petition was untimely as it “was filed more than a year after his conviction became final.” Appellant’s Brief at 12. He claims that the PCRA court erred by not recognizing an “as applied” exception to the PCRA timing requirements. **Id.** at 13. More specifically, relying on our Supreme Court’s decision in **Commonwealth v. Bennett**, 930 A.2d 1264 (Pa. 2007), Appellant argues that trial counsel abandoned him on direct appeal, and through the PCRA process, and due process requires that his direct appeal rights be reinstated. **Id.** at 15-18. Appellant further avers that in **Ross v. Varano**, 712 F.3d 784 (3^d Cir. 2013), “the United States Court of Appeals for the Third Circuit also endorsed equitable tolling of the PCRA’s time limits when an attorney neglects his duties to keep his client informed of what is happening in his case, and misinforms or fails to inform his client of what is happening.” **Id.** at 19.⁴

⁴ “Pennsylvania courts are not bound by the decisions of inferior federal courts where the case specifically concerns Pennsylvania law.” **Commonwealth v. Dunnavant**, 63 A.3d 1252, 1255 (Pa. Super. 2013). The PCRA’s jurisdictional time limitation is not subject to equitable principles such as tolling except as provided by statute. **Commonwealth v. Fahy**, 737 A.2d 214, 222 (Pa. 1999). “The PCRA confers no authority upon this Court to fashion ad hoc equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act.” (Footnote Continued Next Page)

Appellant attempts to invoke the exception set forth at 42 Pa.C.S.A. § 9545(b)(1)(ii), without explicitly citing to it, by relying on **Bennett**. “Under subsection (b)(1)(ii), [Appellant] must also prove that the facts were ‘unknown’ to him and that he could not uncover them with the exercise of ‘due diligence.’” **Bennett**, 930 A.2d at 1274. Here, the PCRA court determined:

Appellant has failed to plead and prove that the facts upon which the claim was predicated were unknown [to him] and that he could not have ascertained those facts through due diligence. These elements are required in order to demonstrate that the delay in filing a PCRA petition was caused by “an event that occur[red] outside the control of the petitioner.” **Bennett**, 930 A.2d, at 1267. In the instant matter, Appellant claims that the facts unknown to him were the procedure for filing a PCRA petition, including the PCRA time-bar limitations, and that his sentencing counsel allegedly abandoned him. We note that “information is not ‘unknown’ to a PCRA petitioner when the information was a matter of public record.” **Commonwealth v. Chester**, 895 A.2d 520, 523 (Pa. 2006). The public record must be accessible to a petitioner. **Bennett**, 930 A.2d, at 1275.

In this case, Appellant or Appellant’s daughter, who often served as Appellant’s “go-between” with Appellant and sentencing counsel and who is Appellant’s “power of attorney,” could have determined, through simple research, the procedure for filing a PCRA petition and any potential time limitations. Indeed, Appellant stated that he talked to other inmates and visited the law library before filing his PCRA petition. Nevertheless, Appellant failed to exercise due diligence in discovering matters of public record in a

(Footnote Continued) _____

Commonwealth v. Harris, 972 A.2d 1196, 1200 (Pa. Super. 2009). Hence, we reject Appellant’s reliance on **Ross v. Varano**, 712 F.3d 784 (3^d Cir. 2013).

timely fashion, which ultimately rendered his PCRA [p]etition time[-]barred.

Appellant also avers that he was abandoned by his attorney and that his attorney failed to act as promised on Appellant's behalf, which allegedly created an unknown fact to serve as the foundation for an exception under Section 9545(b)(1)(ii). Appellant asserts that he was misled into believing that sentencing counsel would notify the [trial c]ourt and ensure the appointment of a new attorney to file his PCRA petition, and Appellant allegedly further believed that the petition would be filed and litigated on his behalf. According to Appellant, he was abandoned because a new attorney was not appointed. [The trial court found] that Appellant's reliance on the exception under Section 9545(b)(1)(ii) is misplaced because either Appellant or Appellant's daughter on her father's behalf, could have determined that a new attorney was not appointed nor was a PCRA petition filed. Appellant, therefore, was not abandoned by his sentencing counsel. Assuming arguendo, however, that sentencing counsel's actions were deemed to constitute abandonment, Appellant failed to file his PCRA petition within 60 days of this occurrence.

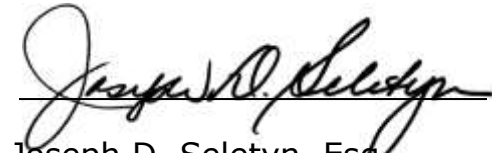
PCRA Court Opinion, 1/25/2013, at 10-11 (record citations omitted).

We agree with the PCRA court's decision. Appellant does not argue that his access to public records was somehow impeded or that the procedures for filing a timely PCRA petition were outside his purview. In filing a *pro se* PCRA petition on April 16, 2012, he acquired information regarding filing prerequisites from other inmates and the law library. Appellant does not explain why he could not uncover the information sooner. Hence, Appellant has not shown the exercise of due diligence in setting forth his current claim. Moreover, Appellant does not challenge the PCRA court's determination that he was notified in July 2011 that he needed to retain new

counsel for PCRA purposes. This finding further supports the PCRA court's determination that counsel's alleged abandonment, which formed the basis of Appellant's PCRA claim, was not unknown to Appellant and could have been ascertained through due diligence. Because ***Bennett*** applies to evidence discovered after the PCRA's one-year jurisdictional time-bar and, here, Appellant knew the evidence supporting his current claim during the one-year period, ***Bennett*** is inapplicable. Based on all of the foregoing, we conclude that Appellant's PCRA petition was untimely and that he raised no claim that he was subject to an exception under the PCRA. Accordingly, both this Court and the PCRA court lacked jurisdiction to entertain Appellant's PCRA petition.

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: 12/4/2013