

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JUSTIN M. MITCHELL,	:	
	:	
Appellant	:	No. 3067 EDA 2011

Appeal from the PCRA Order October 21, 2011
 In the Court of Common Pleas of Montgomery County
 Criminal Division No(s): CP-46-CR-0000309-1999

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 22, 2013

Appellant, Justin M. Martin, appeals *pro se* from the order entered in Montgomery County Court of Common Pleas, dismissing his third Post Conviction Relief Act¹ ("PCRA") petition for untimeliness. Appellant claims the petition was timely pursuant to the "after discovered facts" exception at subsection 9545(b)(1)(ii), the court erred in not appointing counsel to represent him, and the court's Pa.R.Crim.P. 907 notice of intent to dismiss and subsequent dismissal were defective. We affirm.

Appellant was charged with the shooting death of John Woods. On May 20, 1999, a jury found Appellant guilty of murder in the third degree,

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

aggravated assault, carrying a firearm without a license, and possession of an instrument of crime. On July 14, 1999, the trial court imposed a sentence of nineteen to forty-five years' imprisonment. This Court affirmed the judgment of sentence on direct appeal on September 11, 2000,² and the Pennsylvania Supreme Court denied allowance of appeal on February 27, 2001.³

Appellant filed the instant, *pro se* PCRA petition—his third—on August 1, 2011,⁴ alleging “newly discovered evidence which corroborates [his] theory of the defense.”⁵ Appellant’s PCRA Pet., 8/1/11, Attached Answers,

² ***Commonwealth v. Mitchell***, 2846 EDA 1999 (unpublished memorandum) (Pa. Super. filed Sept. 11, 2000) (rejecting claim that trial court erred in not suppressing confession to police).

³ Appellant filed a first, timely *pro se* PCRA petition on January 11, 2002. The court appointed counsel, who filed an amended petition, held a hearing, and denied relief. Appellant did not initially take an appeal, but subsequently filed a *pro se* petition to file a *nunc pro tunc* appeal. The PCRA court denied the petition. On appeal, this Court affirmed, holding the petition was itself a PCRA petition and did not meet the PCRA timeliness requirements. ***Commonwealth v. Mitchell***, 141 EDA 2003 (unpublished memorandum) (Pa. Super. filed Sept. 30, 2003).

⁴ The time-stamp on the face of the petition bears a filing date of August 1, 2011. Pursuant to the prisoner mailbox rule, we may deem the petition filed on July 27, 2011—the date of the cancelled postage on the accompanying envelope. ***See Commonwealth v. Allen***, 48 A.3d 1283, 1284 n.2 (Pa. Super. 2012) (stating that prisoner’s documents are considered filed as of date he handed them to prison officials for mailing).

⁵ Appellant also alleged that in the alternative, he was entitled to a new trial “based on prosecutorial misconduct—specifically, the actions of police personnel in coercing and intimidating witnesses.” Appellant’s PCRA Pet., Attached Answers, at 1. However, he has abandoned this claim on appeal.

at 1. Specifically, he averred that Donte Jackson “has come forward with information and will testify that he saw [the victim, Woods,] reach for the firearm in his [waist]band prior to being shot.” *Id.*

On September 22, 2011, Appellant filed a *pro se* memorandum of law in support of his PCRA petition, in which he addressed for the first time the PCRA’s timeliness requirements. In pertinent part, he alleged that on June 11, 2011, he learned that Donte Jackson had “witnessed [the victim] Woods reaching for the gun in his waistband immediately **before** [Appellant] fired the shot killing him.” Appellant’s Memo. of Law, 9/22/11, at 4. Appellant also explained for the first time that his theory at trial was “that he was in fear of his life and only fired his gun when Woods reached for his gun to shoot him.” *Id.* Thus, he concluded, Donte’s anticipated testimony would corroborate his “account of what occurred.” *Id.* On the following day, September 23, 2011, the Commonwealth filed an answer and motion to dismiss Appellant’s petition, arguing that the petition was untimely.

On October 12, 2011, the PCRA court issued notice of intent to dismiss Appellant’s petition without a hearing, stating it was “satisfied that [Appellant] is not entitled to relief from its independent review of the record.” Order, 10/12/11. The notice provided Appellant twenty days to respond to the notice. Appellant filed an objection, which is time-stamped as filed on October 25, 2011, alleging that the court’s notice failed to state reasons for dismissal, as required by Pa.R.Crim.P. 907, and requesting

additional notice so that he may file an amended petition. On October 21st, the court entered an order dismissing Appellant's PCRA petition. Although the time-stamp of the order predates the time-stamp of Appellant's response, the order specifically stated that the court reviewed Appellant's response.⁶ Order, 10/21/11.

Appellant filed a timely notice of appeal on November 17, 2011, and complied with the court's order to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.⁷ On appeal, Appellant raises three claims: (1) his petition was timely because it was filed within sixty days of his discovery of new evidence; (2) he was entitled to counsel for these PCRA proceedings; and (3) the PCRA court's notice of intent to dismiss failed to specify reasons for dismissal and the PCRA court erred in dismissing his petition before the expiration of time allotted for him to respond. We find no relief is due.

In his first claim, Appellant maintains that his PCRA petition was timely

⁶ Subsequently, a court order dated October 28, 2011, but time-stamped as filed on November 2, 2011, denied Appellant's "Objection to 907 Notice of Intent to dismiss." Order, 11/2/11.

⁷ We note that a cursory review of the docket suggests that Appellant's Pa.R.A.P. 1925(b) statement was untimely. The court issued an order on November 18, 2011, directing Appellant to file a statement within twenty-one days, or by Thursday, December 8th. Appellant's 1925(b) statement is time-stamped as filed on December 12th. However, the accompanying envelope bears a cancelled postage date of December 8th, and thus we deem the statement timely under the prisoner mailbox rule. **See Allen**, 48 A.3d at 1284 n.2.

under subsection 9545(b)(1)(ii). He repeats that on June 11, 2011, he learned the information concerning Donte Jackson, as summarized above. Appellant asserts that he filed the PCRA petition “based on these new facts and evidence on July 26, 2011^[8]—approximately 45 days after learning of them.” Appellant’s Brief at 7. He also contends that “[t]he evidence that Mr. Jackson offers corroborates Appellant’s accounts of what happened that evening.^[1]” *Id.*

On appellate review of a PCRA ruling, “we determine whether the PCRA court’s ruling is supported by the record and free of legal error.” *Commonwealth v. Marshall*, 947 A.2d 714, 719 (Pa. 2008) (citations omitted).

[T]he time limits imposed by the PCRA . . . implicate our jurisdiction to address [PCRA] claims. To be timely, a PCRA petition must be filed within one year of the date that the petitioner’s judgment of sentence became final, unless the petition alleges and the petitioner proves one or more of the . . . statutory exceptions[.]

Id. (citation omitted). The exception at subsection 9545(b)(1)(ii) provides that petition may be filed beyond the general one-year deadline when “ 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[.]” 42 Pa.C.S. § 9545(b)(1)(ii).

We emphasize that it is the petitioner who bears the burden to allege and prove that one of the timeliness

⁸ *See* n.4, *supra*.

exceptions applies. In addition, a petition invoking any of the timeliness exceptions must be filed within 60 days of the date the claim first could have been presented. 42 Pa.C.S. § 9545(b)(2). A petitioner fails to satisfy the 60-day requirement of Section 9545(b) if he or she fails to explain why, with the exercise of due diligence, the claim could not have been filed earlier.

Exception (b)(1)(ii) “requires petitioner to allege and prove that there were ‘**facts**’ that were ‘unknown’ to him” and that he could not have ascertained those **facts** by the exercise of “due diligence.” The focus of the exception is “on [the] newly discovered **facts**, not on a newly discovered or newly willing source for previously known facts.” In [*Commonwealth v. Johnson*, 863 A.2d 423 (Pa. 2004), the Pennsylvania Supreme] Court rejected the petitioner’s argument that a witness’s subsequent admission of alleged facts brought a claim within the scope of exception (b)(1)(ii) even though the facts had been available to the petitioner beforehand. Relying on *Johnson*, [the] Court more recently held that an affidavit alleging perjury did not bring a petitioner’s claim of fabricated testimony within the scope of exception (b)(1)(ii) because the only “new” aspect of the claim was that a new witness had come forward to testify regarding the previously raised claim. [*Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1266-67, 1270 (Pa. 2008).] Specifically, we held that the fact that the petitioner “discovered yet another conduit for the same claim of perjury does not transform his latest source into evidence falling within the ambit of [Section] 9545(b)(1)(ii).”

Marshall, 947 A.2d at 719-20 (footnote and some citations omitted).

In a prior memorandum in this case, this Court held that because the Pennsylvania Supreme Court denied Appellant’s allowance of appeal on direct appeal on February 27, 2001, his judgment of sentence became final ninety days later, on May 28, 2001. *Mitchell*, 141 EDA 2003 (unpublished memorandum at 1-2). Appellant then had one year to file a PCRA petition,

or until February 27, 2002. **See** 42 Pa.C.S. § 9545(b)(1); **Marshall**, 947 A.2d at 719. **See also** Sup. Ct. R. 13. The instant petition was filed more than nine years later. Consequently, we must determine whether the petition properly invoked one of the timeliness exceptions.

In its opinion, the PCRA court stated that Appellant's PCRA petition alleged only "that he has new evidence in the nature of new witness testimony," and that he argued for the first time in his Pa.R.A.P. 1925(b) statement that the petition was timely. PCRA Ct. Op., 1/10/12, at 7-8. The court thus reasoned that this claim is waived because it is argued for the first time on appeal. **See** Pa.R.A.P. 302(a); **Commonwealth v. Bedell**, 954 A.2d 1209, 1216 (Pa. Super. 2008) (stating claims not raised in PCRA court are waived and cannot be raised for first time on appeal).

We note that Appellant did address timeliness before the PCRA court, in his *pro se* memorandum of law. Nevertheless, section 9545(b) clearly states that the **petition** must allege and the petitioner must prove the application of one of the exceptions applies. **See** 42 Pa.C.S. § 9545(b)(1). More critical, however, is that Appellant's petition and memorandum of law merely averred that he learned on June 11, 2011 that Donte Jackson witnessed the victim reach for his gun and waistband, and that this evidence corroborates Appellant's defense theory. This information is not a new **fact**, but instead is a "newly discovered or newly willing source for previously known facts," which, as stated above, cannot support an after-discovered

evidence claim. *See Marshall*, 947 A.2d at 720. Furthermore, Appellant wholly “fail[ed] to explain why, with the exercise of due diligence, the claim could not have been filed earlier.” *See id.* For these reasons, we agree with the PCRA court that Appellant failed to plead and prove the applicability of subsection 9545(b)(1)(ii). Accordingly, the PCRA court lacked jurisdiction to review the merits of his petition. *See id.* at 719.

Appellant’s second claim on appeal is that an evidentiary hearing was required, and that he was entitled to counsel in these PCRA proceedings pursuant to Pa.R.Crim.P. 904(D).⁹ Because the PCRA court lacked jurisdiction to hear Appellant’s petition, this claim is without merit.

Appellant’s final claim is that the court failed to state the reasons for dismissal in its notice of intent to dismiss, and that the court erred in dismissing his petition before the twenty-day period expired, pursuant to Pa.R.Crim.P. 907(1).¹⁰ “The Pennsylvania “Supreme Court has indicated . . .

⁹ “On a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 908, the judge shall appoint counsel to represent the defendant.” Pa.R.Crim.P. 904(D).

¹⁰ “. . . If the judge is satisfied from [review of the PCRA petition] that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. . . .” Pa.R.Crim.P. 907(1).

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that when a PCRA petition is untimely filed, the failure to provide [Pa.R.Crim.P. 907] notice is not reversible error." ***Commonwealth v. Boyd***, 923 A.2d 513, 514 n.1 (Pa. Super. 2007). Accordingly, we find no relief is due.

Order affirmed.